92-733

Supreme Court, U.S.
FILED
SEP 24 1992
OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

In re CURTIS CHEEVES, ET AL. AND

In re THEDORE GIBSON, ET AL.,
Petitioners

ON PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, THE HONORABLE GERALD BARD TJOFLAT, CHIEF JUDGE OF THE ELEVENTH CIRCUIT, THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION, AND THE HONORABLE WILBUR D. OWENS, JR., CHIEF JUDGE OF THE MIDDLE DISTRICT OF GEORGIA

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

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September 24, 1992

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QUESTIONS PRESENTED

In Petitioners' consolidated civil cases the Chief Judge of the Eleventh Circuit Court of Appeals (Respondent herein) has **twice** within the last seven months **temporarily** disqualified all three district judges of the Middle District of Georgia, including Petitioners' presiding judge, Chief Judge Owens. Acting pursuant to 28 U.S.C. § 292(b) upon the ground that in his "judgment the public interest so requires," Chief Judge Tjoflat has **twice** entered orders **temporarily** assigning a United States District Judge for the Middle District of Florida to sit in Petitioners' cases instead of **permanently** assigning Petitioners' cases to an impartial judge.

QUESTION NO. 1

In the case of district judges whose impartiality is questionable enough to require "in the public interest" the appointment of other judges, does not the use of **temporary** appointments of other judges under § 292(b) circumvent and violate the disqualification and **permanent** reassignment mandates of the Fifth Amendment, 28 U.S.C. 455(a), Judicial Canon 3C(1) and 1990 ABA Model Judicial Canon 3E(1)?

QUESTIONS PRESENTED

In Petitioners' cases their counsel filed with the Eleventh Circuit Judicial Council a judicial misconduct complaint under 28 U.S.C. § 372(c) against Chief Judge Wilbur D. Owens, Jr. and District Judge Duross Fitzpatrick. Chief Judge Tjoflat appointed a Special Committee which conducted a twenty-month investigation of the district judges. Objective facts present the appearance that Chief Judge Owens' **first act** upon learning that Petitioners' counsel's misconduct complaint would be dismissed on June 8, 1992, was to deny Petitioners' last § 455(a) recusal motion and order Petitioners' counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions" upon Petitioners' counsel for "harassment" of the court.

QUESTION NO. 2

Applying the objective appearances test of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988) to the objective facts summarized above and detailed, *infra*, would the appearances of a district judge's reprisal and retaliation against counsel for the filing of § 372(c) charges -- charges serious enough to warrant a twenty-month Special Committee investigation -- present an appearance of impropriety compelling the disqualification of the retaliating judge.

RULE 14(b) STATEMENT

The Cheeves petitioners are Lillian Cheeves Bond, Julia Inez Trawick Butts, Mamye Trawick Butts, Curtis Cheeves, Edna Mae Cheeves, Ernestine Cheeves, Frank Cheeves, Hazel Cheeves, Henry Cheeves, III, Lola Cheeves, Sarah Cheeves, Gloria Jean Crumbly, Edgar Crumbly, Jr., Curtis Elliott, Sheila Mills Gilbert, Myrian Trawick Hall, Gloria Louise Trawick Lord, Fleta Hooks Randolph, Marilyn Swinton, Clyde Trawick, Laurty Trawick, Marvin Trawick, Mary Cheeves Trawick and Stephanie Cheeves Tribble.

The Gibson petitioners are Ada Gibson Bond, Alfred G. Gibson, Robert Lee Gibson, Thedore Gibson, Willie James Gibson, Griffin Lewis, Jerry Lewis, Jimmie Lewis, Jr., Jimmie Lewis, Sr., Karen Lewis, Michael Lewis, Myron Lewis, Mary Gibson Robinson, Richard Shinholster and Sara F. Gibson Simmon.

The defendants/respondents in both Cheeves and Gibson are Southern Clays, Inc. and the Rhode Island Charities Trust.

Respondents vis-a-vis mandamus or prohibition relief are Eleventh Circuit Chief Judge Tjoflat, Eleventh Circuit Judges Fay, Birch and Dubina, and Chief Judge Wilbur D. Owens, Jr. of the United States District Court for the Middle District of Georgia, Macon Division.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

In re CURTIS CHEEVES, ET AL. AND

In re THEDORE GIBSON, ET AL.,
Petitioners

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

Petitioners respectfully pray that the Eleventh Circuit's order denying disqualification of Petitioners' trial judge be reversed through issuance of *per curiam* writs of mandamus and prohibition directing that Petitioners' cases be **permanently** reassigned to an impartial judge.

I. ORDERS BELOW

The Eleventh Circuit's order of June 26, 1992 denying Petitioners' Petition for Writs of Mandamus and Prohibition is reproduced at page 1 of the attached Appendix. The December 30, 1991 and July 27, 1992 orders of Chief Judge Tjoflat **temporarily** assigning and designating District Judge Hodges of the Middle District of Florida to sit in Petitioners' cases in the Middle District of Georgia pursuant to 28 U.S.C. 292(b) are reproduced respectively in the Appendix at pages 2-3 and 4-5.

The retaliatory "show cause" order of Chief Judge Owens entered June 5, 1992, denying recusal and directing Petitioners' counsel "to show cause in writing why the court should not impose Rule 11 sanctions" against Petitioners' counsel for "harassment" of the court is reproduced in the Appendix at pages 6-9. This order was the subject of Petitioners' Petition for Writs of Mandamus and Prohibition filed in the Eleventh Circuit on June 12, 1992.

II. JURISDICTION

The Eleventh Circuit entered its *per curiam* order (Appx. A-1) denying Petitioners' Petition for Writs of Mandamus and Prohibition on June 26, 1992. This Petition is timely filed within 90 days of June 26, 1992. Jurisdiction as to the writs of mandamus and prohibition sought hereby is invoked under 28 U.S.C. § 1651(a). Petitioners have also separately filed a petition for writ of certiorari.

III. CONSTITUTION AND STATUTORY PROVISIONS INVOLVED[1]

Fifth Amendment to Constitution.

> No personal shall ... be deprived of life, liberty or property without due process of law....

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[1] Unless otherwise indicated, all emphasis supplied by boldface, italics, or underlined text is that of Petitioners' counsel.

28 U.S.C. § 455(a)

> (a) Any justice, judge, or magistrate of the United States ***shall*** disqualify himself in any proceeding in which his ***impartiality might reasonably be questioned.***

Canon 2, Code of Judicial Conduct for United States Judges

> **A judge should avoid impropriety and the appearance of impropriety in all his activities.**
>
> A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the ***integrity and impartiality of the judiciary.***

Canon 3C(1), Code of Judical Conduct for United States Judges

> C. Disqualification.
> (1) A judge ***shall*** disqualify himself in a proceeding in which his ***impartiality might reasonably be questioned ...***

Canon 3 E(1)(a), ABA 1990 Model Code of Judicial Conduct[2]

> **A judge shall perform the duties of judicial office impartially and diligently.**

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[2] Approved by ABA House of Delegates on August 7, 1990. A LEXIS search on September 21, 1992, disclosed only the following reported decision under Canon 3E(1)(a): *United States v. Ahmed*, 788 F. Supp. 196 (S.D. N.Y. 1992). The Honorable Wilbur D. Owens, Jr. in his order of June 5, 1992, (Appx. 6-9) cited Canon 3 E(1) as the standard under which he disclaimed any bias or prejudice against Petitioners' counsel or his clients. (Appx. 7).

> E. Disqualification.
> (1) A judge ***shall*** disqualify himself or herself in a proceeding in which the judge's impartiality ***might reasonably be questioned***, including but not limited to instances where (1) the judge has a personal ***bias or prejudice*** concerning a party or a ***party's lawyer*** ....

28 U.S.C. § 292(b).

> **§ 292 District judges**
>
> (b) The chief judge of a circuit may, ***in the public interest***, designate and assign ***temporarily***[3] any district judge of the circuit to hold a district court in any district within the circuit.

28 U.S.C. § 2106.

> **§ 2106. Determination**
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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[3] Petitioners' contend that Chief Judge Tjoflat, instead of utilizing § 292(b) to assign a district judge temporarily to special aspects of Petitioners' cases should have utilized § 292(b) to reassign a district judge to sit temporarily for the remaining duration of Petitioners' cases. Of course this Court and the Eleventh Circuit panel below have the power to order a reassignment of Petitioners' cases to another district judge pursuant to 28 U.S.C. § 2106.

IV. STATEMENT OF THE CASE

A. Nature of Petitioners' Civil Cases.

Petitioners consist of 39 black citizens who are the heirs at law of forbears who sold their middle-Georgia lands to the defendants/respondents Southern Clays, Inc. and its sole shareholder, The Rhode Island Charities Trust. Petitioners' cases were filed separately in early 1986, later consolidated, and remain pending today before Chief Judge Owens of the Middle District of Georgia.

In similar fashion to the Ute Indians who were defrauded in the ***sale*** of their interests in underground oil, gas and oilshale, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1971), Petitioners allege in their common law fraud and equitable recission cases that their ancestors were defrauded in the sale of 15 million tons of crude underground "kaolin"[4] reserves worth today at least 30 million dollars.

B. Petitioners' First Apprehensions of Bias and Prejudice.

Beginning in mid-1989 Petitioners and their counsel began to apprehend that Judge Owens harbored an undis-

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[4] Koalin is a valuable white clay indispensable to the manufacture of glossy magazine paper and fine ceramics. According to the five companies which dominate Georgia's kaolin industry, Georgia produces 60% of the entire world output of this extremely valuable industrial mineral.

closed bias and prejudice against a black man named Robert L. Watkins, a resident of middle-Georgia. Because most of Petitioners live outside of Georgia, they had given Watkins, a non-lawyer, limited powers of attorney to prosecute their fraud claims on Petitioners' behalf and agreed to compensate him by paying Watkins fifteen percent of any recovery.

In 1987 Watkins became the subject of a federal grand jury investigation, unbeknownst to Petitioners and their counsel, on the complaint of District Judge Fitzpatrick after conferring with Chief Judge Owens about perjured deposition testimony which had occurred in an unrelated quiet-title action known as *Tarbutton v. All That Tract of Land*, 641 F. Supp. 521 (M.D. Ga. 1986). Judge Fitzpatrick suspected Watkins of having "procured, aided and abetted" the perjured testimony of the civil deposition witness in Tarbutton.

After a grand jury no-billed the first presentment against the Petitioners' attorney-in-fact in early 1989, unbeknownst to Petitioners and their counsel, Judge Fitzpatrick intervened with the General Litigation and Advice Section of the Justice Department in requesting reconsideration of the Section's denial of the U.S. Attorney's request to make a second presentment against Watkins. After Judge Fitzpatrick's intervention the Justice Department reversed itself and the U.S. Attorney thereafter succeeded in indicting Watkins in 1989 on one count

of aiding and abetting the perjury of a civil deposition witness. Chief Judge Owens, Petitioners' presiding judge, denied Watkins' pre-trial recusal motion and presided over one mis-trial resulting from a deadlocked jury and a second trial in which Watkins was convicted and later sentenced to five years and $50,000.

C. History and Scope of Recusal Motions.

Beginning in mid-1989 Petitioners' counsel sensed an animus by Judge Owens toward Watkins and became uneasy about certain stated opinions of Judge Owens respecting Watkins which seemed remarkably similar to those of Judge Fitzpatrick, who by this time had disclosed in May of 1989 his instigation of Watkins' criminal investigation. Judge Fitzpatrick eventually admitted in August of 1989 (prior to Watkins' January 10, 1990 conviction) that he held a personal bias and prejudice against Watkins and recused himself from a civil "kaolin" case involving Watkins' aunts, uncles and cousins. These developments prompted Petitioners' counsel to file the series of recusal motions complained of in Judge Owens' "show cause" order of June 5, 1992. (Appx. 6-9).

Because these recusal motions purportedly constitute the "harassment" charged in Judge Owens' retaliatory "show cause" order of June 5, 1992, (Appx. 6-9) brief attention should

be paid to Judge Owens' misstatements of fact. First the various recusal motions did not rely upon the "same grounds" (Appx. 6) nor did they contain the "same allegations." (Appx. 8). To the contrary each successive motion was predicated on additional, newly discovered disqualifying facts or recent events raising even greater appearances of impropriety. The first three motions exclusively relied upon disqualifying appearances vis-a-vis Judge Owens and Petitioners' personal representative, Watkins, whom Judges Owens and Fitzpatrick consistently characterized as a defacto party in Petitioners' cases.

In contrast the last two recusal motions, although they incorporated prior motions by reference, **focused principally upon the appearances of bias and prejudice toward Petitioners' *counsel* as a result of counsel's filing of a 28 U.S.C. § 372(c) complaint against Judges Owens and Fitzpatrick on July 20, 1990, and ensuing events during the Special Committee's twenty-month investigation of both judges.** Thus **none** of the events asserted in the fourth and fifth recusal motions had **even occurred** as of Judge Owens' denial of the third Watkins-based recusal motion on May 27, 1990.

D. Former Cheeves & Gibson Mandamus Petition.

A former mandamus petition, *In re Thedore Gibson, et al.*, Appeal No. 90-8561, was denied *per curiam* by Circuit

Judges Fay, Kravitch, and Clark on June 25, 1990. A petition for rehearing and suggestion of rehearing *en banc* was denied *per curiam* on September 18, 1990. The prior *Cheeves & Gibson* petition was exclusively Watkins-based and involved none of the disqualifying appearances later spawned by Petitioners' counsel's § 372(c) complaint filed July 20, 1990, and subsequent events which became the subject of Petitioners' fourth and fifth recusal motions relying upon Judge Owens apparent bias and prejudice against Petitioners' *counsel*.

E. Petitioners' Counsel's § 372(c) Complaint .

The appearances of disqualification and reprisal at issue in this Petition principally arise from the following undisputed events. On July 20, 1990, Petitioners' counsel filed Judicial Misconduct Complaint No. 90-2132 ("the Complaint") pursuant to 28 U.S.C. § 372(c) against Judges Owens and Fitzpatrick with the Eleventh Circuit Judicial Council. The Complaint charged the judges, *inter alia*, with concerted and wilful violations of the disqualification and recusal mandates of 28 U.S.C. §§ 144 and 455, and Canons 3A(4) and 3C(1) of the Code of Judicial Conduct for United States Judges. Before even receiving the judges' answers Chief Judge Tjoflat found cause to appoint a Special Committee pursuant to 28 U.S.C. § 372(c)(4) and Judicial Council Rule 4 and issued his notice of

the appointment of a Special Committee dated September 14, 1990.

On January 21 and 22, 1991, Petitioners' counsel met with the Special Committee's private investigative counsel, Alan Sundberg, Esq., a former justice of the Supreme Court of Florida, and his partner, Alan Wagner, Esq. Petitioners' counsel explained in great detail the apparent judicial misconduct committed by Judges Owens and Fitzpatrick, identified numerous witnesses who could give testimony in support of the Complaint, and answered all questions asked by investigative counsel.

Because Petitioners' counsel was disquieted by the investigative counsels' seeming disinterest in facts raising appearances of concealment and lying to counsel by Judges Owens and Fitzpatrick respecting matters possibly material to their disqualification, Petitioners' counsel sought the advice of an Assistant United States Attorney in Atlanta. On this attorney's advice based on his call to the Chief of the Public Integrity Section of the Criminal Division of the Justice Department, Petitioners' counsel summarized in correspondence dated January 24, 1991, the apparent misconduct of Judges Owens and Fitzpatrick for the Public Integrity Section of the Criminal Division. Petitioners' counsel reported conduct of Judge Fitzpatrick possibly violating 18 U.S.C. § 201 (brib-

ery) and summarized facts raising the appearance that Judge Owens and Judge Fitzpatrick, acting individually and in concert, had obstructed justice under the omnibus clause of 18 U.S.C. § 1503. After January 24, 1991, Petitioners' counsel cooperated with the Public Integrity Section and the Federal Bureau of Investigation in providing additional information and documents relevant to their subsequent criminal investigation, which Petitioners' counsel was advised would be limited to only to the bribery allegations involving Judge Fitzpatrick.

Petitioners' counsel subsequently provided additional information to investigative counsel and testified before the Special Committee against Judges Owens and Fitzpatrick, in their presence, on October 9, 1991, and February 18th and 19th, 1992. On February 17, 1991, exercising his right as a § 372(c) complainant to file written argument with the Special Committee, Petitioners' counsel filed a 185-page brief supported by 84 documentary exhibits. The argument extensively reviewed the limited facts and documents then available to Petitioners' counsel[5] and sought to demonstrate that available evidence circumstantially raised the appearance of crimi-

[5] The confidentiality constraints of § 372(c)(14) denied Petitioners' counsel access to the judges' written answers to the Complaint, the report of investigative counsel, and testimony and exhibits of all witnesses called before the Special Committee, including the judges' testimony.

nal obstruction of justice (18 U.S.C. § 1503) and criminal violations of Petitioners' civil rights (18 U.S.C. §§ 241 & 242).

Petitioners' counsel's last testimony left him with the impression that the Special Committee was more interested in attacking the accuser than in considering the worst implications of much of the undisputed circumstantial evidence against the judges. This impression was confirmed by the Special Committee Report made public on June 8, 1992 in conjunction with the § 372(c) complaint's dismissal. For example, the Special Committee Report based on information not available to Petitioners' counsel termed the bribery charges respecting Judge Fitzpatrick's land transaction with Nord Kaolin Company "malicious". Also, as to a rumored phone call by Judge Fitzpatrick respecting Robert Watkins, information which Petitioners' counsel clearly identified as second hand rather than **personal** knowledge, the Special Committee claimed "fabrication" by Petitioners' counsel.

F. Chief Judge Tjoflat's § 292(b) Appointments.

Chief Judge Tjoflat's orders of December 30, 1991 (Appx. 2-3) and July 27, 1992 (Appx. 4-5) temporarily appointing District Judge Hodges of the Middle District of Florida to sit on only **certain aspects** of Petitioners' cases almost speak for themselves. The first order appointed Judge Hodges to rule

on the U.S. Attorney's motion to quash deposition subpoenas served by Petitioners' counsel in an effort to compel all three Middle District judges to disclose fully their knowledge of matters relevant to their disqualification. Such subpoenas were served with the express advice that Petitioners sought such discovery for purposes of filing a new recusal motion, and mandamus petition, if necessary, based upon a **complete** record. Chief Judge Tjoflat's second designation order directed Judge Hodges to sit upon the "show cause" hearing scheduled upon Judge Owens' "show cause" order of June 5, 1992. (Appx. 6-9).

Chief Judge Tjoflat's § 292(b) orders raise more questions than they answer. No docket crisis or physical or mental disability of the three Middle District judges explains the need for such orders. So what "public interest" stood to be served by these orders other than protection of the appearance of judicial integrity and impartiality in the Middle District? What jeopardized the public interest **other than** numerous appearances of impropriety in the context of objective facts casting doubt on all three judges' impartiality.

Who requested such § 292(b) appointments? If requested by one or more of the District Judges, what "public interest" did the judges seek to vindicate beyond their own recognition that their impartiality might seriously be ques-

tioned. If such requests were made, why would they not evidence a deliberate and calculated effort to **circumvent** *sua sponte* recusal obligations under § 455(a) and the Judicial Canons?

If such § 292(b) appointments were **not** requested by any of the district judges, what accounts for Chief Judge Tjoflat's conclusion that "the public interest so requires" **other than** his own determination to guard judicial integrity and impartiality with his defacto disqualification of all three Middle District judges through Judge Hodges' temporary appointment to abate the latest crisis in Petitioners' cases? Twice now Chief Judge Tjoflat has so acted. How many times must a judge's impartiality become questionable enough to prompt his **temporary** replacement before such judge obeys the supposedly self-enforcing, *sua sponte* obligations of § 455? Does § 455 stand for the proposition that a judge's impartiality must become questionable twice or even thrice before he is obligated to act?

Petitioners' have no means of compelling answers to the foregoing queries. That such questions need be answered at all raises appearances which would trouble any disinterested lay observer. Given the ambiguous nature of Chief Judge Tjoflat's § 292(b) appointments, even the most trusting, non-suspicious observer would wonder why the "public interest" supposedly being served by Chief Judge Tjoflat is such

that he cannot leave Middle District judges to quash their own subpoenas and handle their own Rule 11 show cause orders in Petitioners' cases.

G. Judge Owens' Rule 11 "Show Cause" Order.

Determining whether Judge Owens' "show cause" order of June 5, 1992 (Appx. 6-9) presents at least the appearance of a reprisal and retaliation against Petitioners' counsel requires brief consideration of only the following facts.[6]

First, consider the fact that Petitioners' fifth recusal motion focused on and incorporated by reference the same 185-pages of argument which Petitioners' counsel had filed as the complainant in the § 372(c) proceeding. Petitioners' argument to the Special Committee (to which Judge Owens was privy) and Petitioners' fifth recusal motion are indistinguishable. Before Judge Owens, however, Petitioners' counsel's § 372(c) arguments relied upon in the **judicial** context of a recusal motion constitute "harassment."

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[6] This issue of protecting counsel from reprisals or sanctions for filing § 372(c) complaints is among the foremost recommendations of the Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility, a study of § 372(c) operation and effectiveness through 1989. *"We firmly support the proposition that the judge who is the subject of a complaint should have no authority to sanction the complainant directly or indirectly."* Twentieth Century Fund, *The Good Judge* at 10-11 (1989) (emphasis in original).

Second, the Special Committee's investigative counsel did not dismiss Petitioners' counsel's § 372 charges as "harassment."

> "The § 372 complaint raises serious claims of misconduct by Judges Fitzpatrick and Owens involving the trio of kaolin cases and the Watkins prosecution and conviction.
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of actual fact. While the interpretation and liberal extrapolation by Nix of the limited facts to which he had access may have understandably raised misconduct concerns, an investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, **we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive**."

Investigative Report of Messrs. Alan Sundberg and Alan Wagner filed as Defendant's Exhibit IC-A in Eleventh Circuit Miscellaneous Docket No. 90-2132 (emphasis added).

Third, consider the actual animosity toward Petitioners' counsel manifested in Judge Owens' own testimony in the Special Committee hearings. Notwithstanding Judge Owens' assertion in his order of June 5, 1992 that he "harbors no bias or prejudice against Mr. Nix or his clients" (Appx. 8), Judge

Owens' sworn testimony during his mere 25 pages of testimony before the Special Committee raises contrary appearances.

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. **I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.**
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant **other than Mr. Nix**, let's say an attorney **other than Mr. Nix**, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (emphasis added).

Taking Judge Owens at his word, what chance of success do Petitioners cases have if their lead trial counsel for the last six and one-half years must try cases involving $30,000,000 worth of mineral rights in lengthy trials before a jurist who frankly admits that he "can only deal with [Petitioners' counsel] if I say as little as necessary." ? Id. How is Petitioners' counsel to handle what promises to be a day-long pre-trial conference, much less the trials themselves, given Judge Owens' admitted aversion to counsel's questions?

And given the fact that Petitioners' counsel "reminds [Judge Owens] a lot of some of the prisoners [he has] to deal repeatedly on 2255," (Id.) what demeanor toward counsel is Judge Owens likely to transmit to the jury. Every trial lawyer knows that any judge can use the arch of his eyebrows, his tone of voice, his demeanor toward counsel, etc. to tilt the tables of justice very steeply in favor one side or the other yet produce a pristine record not suggestive of any bias or prejudice.

Finally, what is unmistakably clear from Judge Owens' above-quoted testimony is that Petitioners' cases would fair much better before Judge Owens if they simply had a lawyer **"other than Mr. Nix."** Section 455 imposes no duty to switch

counsel to avoid a judge's bias and prejudice against counsel. Where there exists pervasive bias and prejudice against a party's counsel, § 455(a) and new ABA Judicial Canon 3E(1)(a) relieve the party of the need to find another lawyer by entitling him to a different judge whose impartiality toward parties **and their counsel** is not doubtful.

A further anomalous and ironic feature of Judge Owens' "show cause" order is the fact Judge Owens **alone** is claiming "harassment" and seeking Rule 11 sanctions. In contrast, respondents' defense counsel have sought no such sanctions. Indeed, at the "show cause" hearing recently held before Judge Hodges on September 16th, Judge Hodges all but invited respondents' defense counsel to join in Judge Owens' move for sanctions. Defense counsel declined Judge Hodges' virtual invitation with advice to the court that respondents had not sought Rule 11 sanctions in the past and had no intention of seeking same in the future.

If the Court harbors any doubts about disqualifying Judge Owens (and his fellow judges of Georgia's Middle District) the crowning and conclusive appearance which would leave in the mind of the lay observer no doubt as to Judge Owens' bias and prejudice against Petitioners' counsel lies in Judge Owens' disparate treatment of another lawyer who also moved Judge Owens' recusal **on the same grounds relied**

upon by Petitioners' counsel but who had filed no § 372(c) charges against Judge Owens. Petitioners' counsel was granted an extension through July 15, 1992 to file his written response to Judge Owens' "show cause" order of June 5th. Was a § 292(b) temporary appointment of Judge Hodges deemed necessary in the "public interest" during the forty-day period from June 5th to the filing of Petitioners' counsel's written response on July 15th? Absolutely not. No, Chief Judge Tjoflat did not find that the "public interest" required another appointment of Judge Hodges until twelve days **after** the following response was filed by Petitioners' counsel with Judge Owens on July 15th.

> "This Response will demonstrate that the fifth recusal motion filed in the above-styled causes, which was not even addressed to The Honorable Wilbur D. Owens, Jr., but rather to The Honorable William Terrell Hodges, was well grounded in fact, warranted by existing law and not interposed for any improper purpose. Indeed, in order for this Court to find Plaintiffs' counsel guilty of "harassment", the Court would have the make the same finding with respect to L. Ray Patterson, Esq., perhaps Georgia's foremost expert in legal and judicial ethics, who filed on June 8, 1992, a motion to recuse the Court founded upon the same grounds relied upon by Plaintiffs' counsel and founded upon all seven prior recusal motions in U.S. v. Watkins and Cheeves & Gibson. Given the identical nature of the recusal motions filed by Plaintiffs' counsel

> and Mr. Patterson, why has the Court not termed Mr. Patterson's recusal motion as "harassment" and required Mr. Patterson to show cause why he should not be sanctioned under Rule 11? There is nothing in the record to account for such disparate treatment of counsel **other than** judicial misconduct and criminal charges filed by Mr. Nix but not Mr. Patterson, such that the sanctions which the Court apparently intends to impose under Rule 11 constitute purely and simply a reprisal against Mr. Nix for his exercise of rights unders laws of the United States and his adherence to obligations imposed by the Code of Professional Responsibility adopted by the State Bar of Georgia."

Response of July 15, 1992 at 1-2. Can Judge Owens deny that his reading of the above-quoted response of Petitioners' counsel prompted him to request of Chief Judge Tjoflat another temporary appointment of Judge Hodges to extricate Judge Owens once again from the jeopardy posed to his impartiality by his having yielded on June 5th to his naturally human and irresistible impulse to retaliate against Petitioners' counsel's § 372(c) charges as soon as Judge Owens knew their outcome?

V. REASONS FOR GRANTING THE WRIT.

THE DISREGARD BELOW OF THE APPEARANCES OF REPRISAL AND RETALIATION BY THE PRESIDING JUDGE AGAINST PETITIONERS' COUNSEL AND THE

PIECEMEAL USE OF § 292(B) "PUBLIC INTEREST" APPOINTMENTS TO REPLACE ONLY TEMPORARILY THREE JUDGES OF DOUBTFUL IMPARTIALITY VIOLATES DISQUALIFICATION AND REASSIGNMENT STANDARDS, REPRESENTS AN ABUSE OF DISCRETION AND UNSURPATION OF POWER, AND THREATENS PETITIONERS WITH IRREPARABLE HARM REQUIRING THIS COURT'S INTERVENTION.

The legal standards are so clear and the appearances presented so grave that the factual issue of whether this Court's intervention is warranted might well be argued and answered with but three words -- **RES IPSA LOQUITUR**. Nevertheless, a brief survey of applicable authorities and prior instances of this Court's intervention serve to prove that the Court has not hesitated to act in circumstances less serious than those facing Petitioners.

A. Disqualification Standards

> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865 (1988). Chief Judge Tjoflat has already apparently twice determined that circumstances in Petitioners' cases involving all three judges of Georgia's Middle District may pose the "temptation ... not to hold the balance nice, clear and true." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986). In the case of Judge Owens and the factual appearances summarized above, a disinterested observer would be hard pressed not to conclude that Judge Owens has already succumbed to temptation and proven by his above-quoted words and indisputable deeds his lack of impartiality in Petitioners' cases.

B. Lack of Adequate Alternative Relief.

The Second Circuit has observed that "there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself' ... A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Business Machines Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980). Likewise, in the seminal case of *Berger v. United States*, 255 U.S. 22 (1921), a case which predated the broad mandate of § 455(a), this Court eloquently explained the inadequacy of appellate remedies

other than mandamus.

> To commit to the judge a decision upon the truth of the facts [in the Section 144 affidavit] gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36 (emphasis added).

Petitioners have already exhausted every conceivable remedy available before the district court and the Eleventh Circuit has denied two separate mandamus petitions. The only factual circumstance presented herein which was not argued to the Eleventh Circuit before its denial of Petitioners' last mandamus petition on June 26, 1992, was Chief Judge Tjoflat's subsequent order of July 27, 1992, appointing Judge Hodges to sit upon Judge Owens' June 5 "show cause" order issued against Petitioners' counsel.

Given the fact that the Court has stated that "the right to grant mandamus to require jury trial where it has been improperly denied is settled," *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959), it would be anomalous indeed if the Court did not find as well in Petitioners' cases that it has equal power

to grant mandamus or certiorari and require reassignment and trial before an impartial district judge where Petitioners' right to disqualification of a judge whose "impartiality might reasonably be questioned" has been improperly denied.

C. Exceptional Circumstances.

The circumstances presented here speak for themselves. To Judge Owens' claim that Petitioners' repeated recusal motions represent a "campaign" to disqualify him, the last motion supposedly rising to the level of "harassment" (Appx. 9), Petitioners would simply observe that it is the judges' conduct, not that of Petitioners, which has created the extraordinary state of affairs before this Court. The course of the § 372(c) Complaint before the Eleventh Circuit Judicial Council demonstrates the seriousness of the judges' conduct.

Chief Judge Tjoflat could have exercised his authority to dismiss the § 372(c) complaint outright had he deemed it frivolous. Instead, he deemed it necessary to appoint a Special Committee and devote twenty months of time, unknown investigative attorneys' fees, and countless hours of the precious judicial time of five Special Committee members to resolution of the complaint. The complaint proceedings alone and the actions of the Chief Judge and the Special Committee reflect **at a minimum** their belief that the complaint's objective facts possibly presented at best the "appearance of impropriety"

and at worst actual impropriety prejudicial to the integrity of the judiciary if the "worst implications" of the objective facts were realized.[7]

It is apparent that the quantum of facts in Petitioners' case warranting the extraordinarily rare appointment of a Special Committee **substantially exceeded** the quantum of facts under which § 455(a)'s hypothetical, fully-informed "man-in-the-street" might reasonably question the impartiality of the judges. This conclusion is inescapable unless the Court is prepared to believe that the Special Committee wasted twenty months worth of time and resources investigating appearances so inconsequential that even a fully informed objective, disinterested lay person would not give them a second thought. Accordingly, the length, scope, and expense of the Special Committee's investigation has itself become one of the single most indicative "objective facts" upon which a disinterested lay person, fully informed as to the complaint proceeding "might reasonably question the impartiality" of the judges investigated notwithstanding the dismissal of the charges.

D. Abuse of Discretion.

When it comes to the question of disqualification, a federal judge's discretion is very narrowly circumscribed by

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[7] *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524, n.12 (11th Cir. 1988).

the mandates of Sections 144 and 455 and The Code of Judicial Conduct for United States Judges. This Eleventh Circuit has stated the standard for recusal as follows:

> "Congress rewrote section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of section 455, a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist. Section 455 does away with the old 'duty to sit' doctrine and requires judges to resolve any doubts they may have in favor of disqualification.
>
> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge. The standard for recusal under section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."

United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)(emphasis added) (citations omitted).

The "objective" test of § 455(a) is best understood in light of the problem which it was intended to address.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg, 486 U.S. 864-65 (footnote omitted) (emphasis added).

The purpose of recusal is to protect the appearance as well as the reality of justice. "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance." *Hall v. Small Business Administration*, 695 F.2d 175, 176 (5th Cir. 1983). Thus the purpose of § 455 is "to promote public confidence in the judicial process." *Liljeberg*, 486 U.S. 860. The question, then, is not "whether there was actual bias," but whether there was "'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Spruell v. Jarvis*, 654 F.2d 1090, 1095 (5th Cir. 1981).

While the alleged bias must be personal as opposed to judicial in nature, *United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985), here the alleged bias is personal. "The objective appearance of bias arises out of a number of accusations made by defendant and his counsel concerning [the judge] and certain members of [his] staff." *United States v. Journet*, 620 F. Supp. 684 (W.D. Pa. 1985). See also *United States v. Meyerson*, 677 F. Supp. 1309 (S.D.N.Y. 1988) (Although prosecutor's allegations were untrue, judge voluntarily recused himself because his resentment of prosecutor's tactics prevented him from maintaining impartiality and appearance of impartiality that are necessary to the proper administration of justice.)

Since a reasonable judge would find it necessary to disqualify himself, or herself in the face of the allegations made by Petitioners' counsel in his complaint and prior recusal motions, the basis for disqualification here rises to constitutional dimensions. This is because the Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990).

In the words of the Eleventh Circuit, the question that must be answered is whether the material facts create a situation that "Presents a potential for actual impropriety if the

worst implications are realized.'" *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 n. 12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied, 109 S. Ct. 2066 (1989). After drawing the worst implications from the material facts presented, the Eleventh Circuit has held that it must "resolve any doubts ... in favor of disqualification." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (emphasis added).

The Eleventh Circuit's violation of its own above-cited standards in Petitioners' cases is an abuse of discretion which permits a disqualified judge to usurp powers which by all rights belong only to a judge whose impartiality is beyond reasonable question in Petitioners' cases.

VI. CONCLUSION

> [Disqualification of a judge poses] no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?[8]

Through the issuance of *per curiam* writs of mandamus and prohibition directing reassignment on remand, Petitioners respectfully pray that this Court intervene in their causes and accord them that "level playing field" guaranteed them by the Due Process Clause and other standards -- rights which have become "more honored in the breach than in the observance" in Petitioners' cases.

[8] *Berger v. United States*, 295 U.S. 22, 35 (1921).

Franklin R. Nix
Counsel for Petitioners

September 24, 1992

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IN THE UNITED STATES COURT
OFAPPEALS FOR THE
ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 26 1992
MIGUEL J. CORTEZ
CLERK

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

On Petition for Writ of Mandamus/Prohibition

BEFORE: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

Filed at 10:05 A.M.

DEC 30 1991

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning December 27, 1991, to handle the motions to quash the subpoenas directed to Chief Judge Wilbur D. Owens, Jr., Judge J. Robert Elliott, and Judge Duross Fitzpatrick, and any matter relating to any party's attempt to take the depositions of those judges, in Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees, Consolidated Civil Action File No. 86-43-1-

MAC(WDO), and United States of America v. Robert L. Watkins, Criminal No. 89-46-MAC(WDO), until completion of the matter and thereafter as may be required to complete unfinished business.

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: December 27, 1991

Filed at 4:45 P.M.

JUL 27 1992

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning July 23, 1992, to handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr. to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by

and through its Trustees, Consolidated Civil Action File No. 86-43-1-MAC(WDO), and United States of America v. Robert L. Watkins, Criminal No. 89-46-MAC(WDO).

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: July 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 4:45 P.M.

JUN 5 1992

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

CURTIS CHEEVES, et al. Plaintiffs,	:	
vs.	:	C. A. NO. 86-43-1-MAC (WDO) 86-44-2-MAC (WDO)
SOUTHERN CLAYS, INC., et al., Defendants.	:	

ORDER

Before the court is plaintiffs' fifth motion to recuse this judge under Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct, 28 U.S.C. § 455, and the Fifth Amendment. The grounds alleged for recusal are the same grounds alleged and rejected on the four previous motions for recusal.

DISCUSSION

Title 28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himshelf in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice
> concerning a party ....

Canon 3(E)(1) provides that:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where ...
>
> (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer.

The test for recusal under both § 455(a) and Canon 3(e)(1) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). The alleged bias or prejudice must stem from an extrajudicial source. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988). As this court has previously determined, see Orders of January 17, 1990, January 30, 1990, May 23, 1990, and December 13, 1991, Nix has failed to demonstrate any extrajudicial bias on the part of this judge.[1] Nor has Nix raised any new allegations in his latest motion to recuse this judge.

---

[1] In addition, the Eleventh Circuit has denied Nix's petition for writ of mandamus and prohibition seeking recusal of this judge in the instant action. No. 90-8561 (June 25, 1990).

This court does not have, with due respect to Mr. Nix's demands, a duty to reconsider the same allegations over and over again.

Furthermore, this court's rulings in the four previous recusal motions are insufficient to justify recusal. *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). In rare circumstances, however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.

With respect to plaintiffs' Fifth Amendment claim, "it would be anomalous to hold that a claim under [sections 455 and 144] insufficient on its merits could nevertheless satisfy the constitutional standard." *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980). Therefore, this court's rejection of plaintiffs' claims under section 455 "*a fortiori* defeats [their] due process allegations." Id.

For the reasons set forth above, the court concludes that a reasonable person who knows all the facts would not find that this judge's impartiality might reasonably be questioned. Consequently, plaintiffs' motion to recuse this judge is hereby DENIED.

The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

So ORDERED, this 5th day of June, 1992.

/s/ Wilbur D. Owens, Jr.

WILBUR D. OWENS, JR.,
UNITED STATES DISTRICT JUDGE

CL:lab

ENTERED ON DOCKET
June 5, , 19 92
Gregory J. Leonard, Clerk
by: /s/ Helen F. Newberry
Deputy Clerk

FILED
NOV 19 1992
OFFICE OF THE CLERK

Nos. 92-733 & 92-734

In The

Supreme Court of the United States

October Term, 1992

CURTIS CHEEVES, *et al.*,

Petitioners,

vs.

SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST,

Respondents.

On Petition for Writs of Certiorari, Mandamus and Prohibition to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI, MANDAMUS AND PROHIBITION

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QUESTIONS PRESENTED

1. Given 28 U.S.C. § 292(b), which states that "the chief judge of a circuit *may*, in the public interest, designate and assign *temporarily* any district judge of the circuit to hold a district court in any district within the circuit" (emphasis added), did the chief judge of the Eleventh Circuit abuse his discretion by assigning a district judge in this case *temporarily* to decide two matters relating to petitioners' repeated attempts to recuse the presiding judge?

2. Must a presiding judge be deemed to have engaged in retaliation against petitioners' counsel, sufficient to warrant that judge's recusal, merely because the judge suggested that counsel's conduct may have violated Fed. R. Civ. P. 11 in that counsel filed five successive motions for recusal, all related to the very same set of underlying facts that had previously been determined both by the district court and by the Eleventh Circuit to be insufficient to warrant recusal?

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APPENDIX

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STATEMENT OF THE CASE

The petitions for certiorari, mandamus and prohibition now before this Court are the latest installment in what has regrettably become petitioners' apparently endless effort to disqualify Judge Wilbur D. Owens, Jr. of the Middle District of Georgia, who has been presiding over these consolidated cases since they were filed in 1986.[1] Petitioners' quest for recusal has been denied at every turn, including in rulings on seven motions filed with the district court, on one appeal and two mandamus petitions to the Eleventh Circuit and on one unsuccessful prior petition for certiorari to this Court in a related case. *See Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1584 (M.D. Ga. 1992) (describes seven motions); *Cheeves v. Southern Clays Inc.*, No. 86-43-1-MAC (WDO) (M.D. Ga. Oct. 30, 1992) (describes seven motions) (included in Appendix to this Brief at 1a); *In re Theodore Gibson, et al.*, No. 90-8561 (11th Cir. June 25, 1990) (first denial of writs of mandamus and prohibition); *In re Robert Watkins, Theodore Gibson, Curtis Cheeves, et al.*, No. 92-8554 (11th Cir. June 26, 1992) (second denial of writs of mandamus and prohibition) (included in Petitioners' Brief in No. 92-734 at A-1); *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990) (table case) (rejecting recusal argument) (included in Appendix to this Brief at 13a), *reh'g and suggestion for reh'g en banc denied*, 931 F.2d 901 (11th Cir.) (table case), *cert. denied*, __ U.S. __, 112 S. Ct. 333 (1991).

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1. The merits of the underlying consolidated cases, which are not at issue here, concern petitioners' challenge to the validity of two purchases of land by respondent Southern Clays, Inc., which was at all material times owned by respondent The Rhode Island Charities Trust. By way of providing further information to comply with this Court's Rules 24.1(b) and 29.1, respondents note that Southern Clays, Inc. has no subsidiaries, and also note that petitioners have listed as petitioners a number of persons who are not plaintiffs in the cases below.

Petitioners' seven motions seeking to have Judge Owens recused have been filed in two cases. *See* Appx., 1a. Five of the motions were filed in these consolidated civil cases ("the *Cheeves* civil cases") now before this Court. Appx., 2a. Two others were filed in a criminal proceeding ("the *Watkins* criminal case"), then pending before Judge Owens involving Robert Lee Watkins, a non-attorney representative of the petitioners who had been charged with suborning perjury. Appx., 2a, 3a. All seven of the recusal motions have related in varying degrees to what petitioners contend was an improper conference between Judge Owens and another judge in his district, Judge Duross Fitzpatrick. Appx., 6a.

In the conference between the two judges, Judge Fitzpatrick informed Judge Owens, as the Chief Judge of the Middle District, of his belief that Mr. Watkins had suborned perjury in a case pending before him. *See United States v. Watkins,* No. 90-8317, slip op. at 2-3 (11th Cir. Dec. 7, 1990) (unpublished), included in Appendix to this Brief at 13a. Judge Fitzpatrick sought Judge Owens' directions on how to handle the cases pending before Judge Fitzpatrick involving Mr. Watkins under the circumstances. Appx., 14a. The event of this conference has formed the centerpiece of petitioners' motions to recuse, and it is the principal basis for their contention that Judge Owens either is biased or should be assumed to be biased against Mr. Watkins, and also against petitioners and their counsel by association. *See* Appx., 6a.

Judge Owens rejected petitioners' first three motions for recusal in the *Cheeves* civil cases, ruling, among other things, that a conference concerning the administration of the court between two judges is not an *extra-judicial* event, which is the kind of event necessary to support recusal. *See* 797 F. Supp. at 1577. Petitioners responded to these rulings by seeking mandamus relief in the Eleventh Circuit, which was denied. *In re Theodore Gibson,* No. 90-8561 (11th Cir. June 25, 1990).

Contemporaneously with these events in the *Cheeves* civil cases, parallel events were occurring in the *Watkins* criminal case. Mr. Watkins and his counsel (who also serves as petitioners' counsel in the *Cheeves* civil cases) filed two motions raising the same recusal issue, and Judge Owens made similar rulings rejecting them. *See* 797 F. Supp. at 1575-77. Mr. Watkins appealed those rulings to the Eleventh Circuit. The Eleventh Circuit expressly rejected the recusal challenge holding affirmatively that the Judge Owens-Judge Fitzpatrick conference was not grounds for recusal as a matter of law. Appx., 14a-15a.

The Eleventh Circuit explained the circumstances surrounding Judge Fitzpatrick's alleged communication with Judge Owens as follows:

> [Watkins] . . . asserts that [Judge Owens] was biased as a result of conferring with [Judge Fitzpatrick]. Taking all reasonable inferences favorable to [Watkins], the context of the alleged conference is as follows: [Judge Fitzpatrick], while presiding in a civil case, conferred with his chief judge [Judge Owens] concerning the appropriate procedure when he suspected that [Watkins] had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case.

Appx., 14a. The Eleventh Circuit concluded that these facts, even when viewed in the light most favorable to Mr. Watkins, did not constitute a legally sufficient argument for disqualification:

> [A]ny information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of [Judge Owens].

Appx., 14a-15a. After the Eleventh Circuit rejected his appeal, Mr. Watkins petitioned this Court for certiorari to review the decision of the Eleventh Circuit on the recusal issue, and this Court denied certiorari. *Watkins v. United States*, __ U.S. __, 112 S. Ct. 333 (1991).

While the criminal matter was being pursued through the appellate process, counsel for petitioners and Mr. Watkins filed judicial misconduct charges against Judge Owens relating to the Judge Owens-Judge Fitzpatrick conference with the Eleventh Circuit Judicial Council under 28 U.S.C. § 372(c). Petition for Certiorari in No. 92-734, p. 9.[2] In the *Cheeves* civil cases, petitioners subsequently filed a fourth motion to recuse Judge Owens on the grounds that Judge Owens must have become biased by that point against *counsel* because counsel had made so many allegations of wrongdoing against Judge Owens. *See* 797 F. Supp. at 1578. That motion was denied.

Petitioners then sought to file a fifth recusal motion in the *Cheeves* civil cases, but, before doing so, petitioners sought to take the depositions of Judge Owens and the other two judges in the Middle District of Georgia to support their then-proposed fifth recusal motion again relating to the Judge Owens-Judge Fitzpatrick conference. Rather than have Judge Owens decide

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2. The charges of misconduct against Judge Owens were rejected by the Eleventh Circuit Judicial Council. Petition for Certiorari in No. 92-734, p. 12.

whether he and the other judges in the Middle District of Georgia should be deposed, the Chief Judge of the Eleventh Circuit (the Honorable Judge Gerald Bard Tjoflat) issued an order pursuant to 28 U.S.C. § 292(b) and appointed Judge W. Terrell Hodges of the Middle District of Florida to sit temporarily in the Middle District of Georgia to decide whether the judges of the Middle District of Georgia could be deposed.[3] 797 F. Supp. at 1572. After receiving this temporary assignment, Judge Hodges held a hearing and later issued an order on June 17, 1992 ruling that the judges could not be deposed under the circumstances. 797 F. Supp. at 1570-84.

While the deposition issue was pending, petitioners filed the referenced fifth motion for recusal. Judge Owens subsequently rejected that fifth motion and stated that:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix [petitioners' counsel] has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

(Order of June 5, 1992, included in Appendix for Petition for Certiorari in No. 92-734 at A-9). Judge Owens was relying on Rule 11 of the Federal Rules of Civil Procedure which prohibits parties and their counsel from filing any pleading which is baseless or which is for an improper purpose, such as to harass.[4]

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3. 28 U.S.C. § 292(b) provides:

> The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

4. Fed. R. Civ. P. 11 provides as follows:

(Cont'd)

Following Judge Owens' order suggesting a Rule 11 violation, Judge Tjoflat of the Eleventh Circuit, again acting under the authority of 28 U.S.C. § 292(b), appointed Judge Hodges a second time to decide the Rule 11 issue. In the interim, petitioners

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(Cont'd)

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

sought and were denied mandamus relief on the issue of Judge Owens' rejection of the fifth motion for recusal. Petition for Certiorari in No. 92-734, A-1. Following that denial of mandamus by the Eleventh Circuit, petitioners have petitioned for certiorari, mandamus and prohibition in this Court.

Shortly after petitioners filed the instant petitions for certiorari, mandamus and prohibition here, Judge Hodges completed his second temporary appointment by ruling on the Rule 11 issue. Appx., 1a-12a. He ruled that petitioners' counsel had violated Rule 11. Appx., 10a. Judge Hodges fined petitioners' counsel, finding that "no reasonable lawyer . . . would have filed the last two motions [for recusal] after the Court of Appeals decisions." Appx., 10a.

In deciding the Rule 11 issue, Judge Hodges specifically rejected the contention that petitioners' various recusal motions (including those filed in *United States v. Watkins*) were each based on different grounds. Judge Hodges stated:

> All of the motions . . . and the orders denying them, shared two common features which [petitioners' counsel] simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the [petitioners'] agent, so that Chief Judge Owens' impartiality toward Watkins and the [petitioners] might reasonably be questioned.

Appx., 6a (footnote omitted). Judge Hodges also found all of the

motions were premised on an argument that clearly lacked support under the disqualification statutes:

> Secondly, the orders denying the motions — including the unpublished opinion of the Court of Appeals in the criminal case [*United States v. Watkins*] — consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

Appx., 6a. Judge Hodges imposed sanctions in part because petitioners counsel urged and re-urged a claim that "was repeatedly and correctly rejected as legally insufficient." Appx., 9a.

Petitioners now petition this Court for writs of certiorari, mandamus and prohibition. Petitioners argue that Chief Judge Tjoflat did not have the authority to make two temporary appointments of Judge Hodges, and they argue that Judge Tjoflat should have instead appointed Judge Hodges permanently to handle the entire case. Petitioners also argue that Judge Owens' Rule 11 statements represent retaliation against petitioners' counsel and reflect a bias against counsel, allegedly mandating Judge Owens' recusal. For the reasons stated herein, respondents submit that these arguments do not constitute grounds for granting writs of certiorari, mandamus or prohibition in this case.

THE WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION SHOULD BE DENIED

Respondents submit that the instant petitions for certiorari, mandamus and prohibition plainly do not meet this Court's criteria for the granting of such writs. *See* Sup. Ct. R. 10, 20.

1. The Two Issues Presented In The Petitions Were Not Presented To The Court of Appeals.

Petitioners ask this Court to grant certiorari, mandamus and prohibition on two issues: (1) whether a judge can be temporarily assigned, rather than permanently assigned, to a case under 28 U.S.C. § 292(b); and (2) whether Judge Owens' suggestion of a Rule 11 violation constitutes a reprisal against petitioners' counsel mandating recusal. *See* Petition for Writ of Certiorari in No. 92-734, pp. i-ii. Petitioners imply that the Eleventh Circuit wrongfully failed to grant them relief on these issues, and petitioners seek a "reversal" in this Court. *Id.* at 1, 24, 30. Yet, neither of these two issues was argued to the Eleventh Circuit. *See* 11th Cir. Petition for Mandamus, included as an Appendix to this Brief at 16a-29a.

The Eleventh Circuit was presented with the general question of whether the mere length of the 28 U.S.C. § 372 Judicial Council proceedings involving Judge Owens constituted a sufficient appearance of impropriety so as to require recusal of Judge Owens in these cases. The two issues now raised here were not addressed below, and that itself constitutes a sufficient reason to deny the writs requested. It is not the practice of this Court to act as a court of first resort to decide issues that were not previously presented to the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (*per curiam*).

2. The Petitions Do Not Meet The Criteria For Certiorari, Mandamus or Prohibition.

Petitioners do not claim to have satisfied any of the criteria for certiorari or mandamus set out in Sup. Ct. R. 10 and 20, with the exception that petitioners purport to describe exceptional circumstances and an abuse of discretion allegedly necessitating relief which cannot be obtained elsewhere. Petition for Certiorari in No. 92-734, pp. 23, 25, 26. Respondents respectfully submit that it is not an exceptional circumstance (1) for the chief judge of the Eleventh Circuit to make a *temporary* appointment of a district judge under a statute that expressly allows *temporary* appointments (28 U.S.C. § 292(b)); and (2) for Judge Owens to conclude that petitioners' counsel might have violated Rule 11 by filing a fifth motion for recusal after a previous four motions were rejected, all related to the very same underlying circumstances.

In addition, the alleged exceptional circumstances here all arise out of the same recusal fact pattern, and none of the three courts that have considered those facts to date — including this Court — have found that those facts warrant any relief whatsoever, much less the discretionary and extraordinary relief represented by writs of certiorari, mandamus and prohibition. Moreover, there can be no showing that relief cannot be obtained elsewhere since the precise two issues here, while arising out of the same basic facts, have not been presented to the Eleventh Circuit. Finally, the issue of recusal is premature, since plaintiffs seek interlocutory relief before any judgment on the merits has been entered against them.

3. There Is No Basis For Reviewing Judge Tjoflat's Temporary Appointment of Judge Hodges Under 28 U.S.C. § 292(b).

Petitioners' lead issue is their complaint that Judge Tjoflat appointed Judge Hodges to these cases temporarily to decide two recusal-related issues, instead of appointing him permanently to

decide all issues, including the merits. Judge Tjoflat's decision was made under 28 U.S.C. § 292(b), which provides:

> The chief judge of a circuit *may*, in the public interest, designate and assign *temporarily* any district judge of the circuit to hold a district court in any district within the circuit.

28 U.S.C. § 292(b) (emphasis added). The statute thus expressly contemplates temporary appointments and gives the chief judge discretion as to when to exercise this power. Judge Tjoflat's decision falls within his discretion under the statute, and no abuse of that discretion has been shown. Petitioners have cited no case calling into question the exercise of discretion undertaken here.

Moreover, it was entirely proper for Judge Tjoflat to decide that the two issues assigned to Judge Hodges were appropriate for decision by him, while the rest of the case could remain with Judge Owens. The two issues assigned to Judge Hodges were (1) whether Judge Owens and two other judges should be deposed; and (2) whether petitioners' counsel had harassed Judge Owens in violation of Rule 11 by filing a fifth consecutive motion for recusal on the same subject. Both of these issues involved a question of whether Judge Owens was entitled to relief — relief from a deposition and relief from alleged harassment. It was perfectly reasonable for Judge Tjoflat to decide that a judge other than Judge Owens should decide whether Judge Owens was entitled to relief. Judge Hodges was appointed for that purpose. It is equally reasonable for Judge Owens to retain jurisdiction over the remainder of the case, including over the merits, particularly where the remaining matters do not involve any issue of relief in favor of Judge Owens.

4. It Does Not Constitute Reprisal Mandating Recusal For A Judge To Suggest That Counsel Violated Fed. R. Civ. P. 11 By Filing A Fifth Motion For Recusal Based on The Same Circumstances Rejected As Grounds For Recusal In Four Prior Motions.

Petitioners argue that Judge Owens should be recused because, even if he is not prejudiced against petitioners, he has become biased against petitioners' *counsel.* This bias against counsel is said to arise out of Judge Owens' alleged reaction to the charges of wrongdoing lodged against him by petitioners' counsel. The bias is said to be manifested by Judge Owens' suggestion in June 1992 that petitioners' fifth motion for recusal had "risen to the level of harassment", warranting sanctions under Fed. R. Civ. P. 11, unless petitioners' counsel could show that sanctions were not warranted. Petitioners' argument is severely flawed, and does not warrant a writ of certiorari, mandamus or prohibition.

First, the ruse of attempting to turn the *accusation* of disqualification into *grounds* for disqualification has been generally rejected by the courts. As noted in 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542 (2d ed. 1984), "[a] party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against him . . . ." *Id.* § 3542, pp. 577-78. In accordance with this principle, courts have not allowed disqualification to be based on the filing of a judicial complaint or other forms of attack. *See In re Winslow,* 107 B.R. 752, 753 (D. Colo. 1989) ("The filing of a complaint with the Judicial Council is not grounds for disqualification."); *United States v. Studley,* 783 F.2d 934, 940 (9th Cir. 1986) ("A judge is not disqualified by a litigant's suit or threatened suit against him . . . or by a litigant's intemperate and scurrilous attacks . . . ."). It is clear that the disqualification statutes are not to be abused in this fashion:

> This motion raises another issue: the potential abuse of the disqualification statute

> as a method of avoiding having cases heard by a particular judge. Absent a clear and reasonable indication that prejudice against a party urging recusal of a judge is likely to result, the moving party should not be able to "bootstrap" its recusal argument with a second claim that the judge now will be biased against it because it has raised the question of the judge's impartiality.

In re X-Cel, Inc., 61 B.R. 691, 695 (N.D. Ill. 1986), *appeal dismissed*, 823 F.2d 191 (7th Cir. 1987).

As the foregoing authorities make clear, the mere fact that petitioners and their counsel have attacked Judge Owens and filed a judicial complaint is not grounds for automatic disqualification. If it were otherwise, all litigants would have within their power the tool to easily avoid judges, who, for whatever reason, they wish to avoid. This would effectively enable "judge shopping." Contrary to petitioners' argument, courts cannot be disqualified on the basis of theoretical speculation that the court might not be impartial.

Second, petitioners cannot use as a grounds for recusal an allegation of reprisal based on the mere fact that Judge Owens believed that a Rule 11 violation had occurred. Fed. R. Civ. P. 11 provides in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, *the court*, upon motion or *upon its own initiative*, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses

> incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Emphasis added.) The rule contemplates that Rule 11 procedures can be invoked by the court on its own initiative. This suggests that such invocations are in fact normal within the framework of the Rule, not extraordinary grounds for recusal of the judge.[5]

Finally, the crowning evidence on this point is that Judge Owens' suggestion of a Rule 11 violation was found to be meritorious by an independent judge. Appx., 10a. This is further evidence that it was not per se retaliation, as petitioners suggest.

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5. Petitioners observe that respondents did not seek Rule 11 sanctions and they argue from that that Judge Owens' perceptions of a Rule 11 violation were unique and retaliatory. Brief for Petitioner in No. 92-734, p. 19. This is a specious and unjustified contention. Respondents have uniformly argued that all of petitioners' recusal motions were repetitive and baseless. Respondents refrained from seeking Rule 11 sanctions simply because the subject appeared to be more appropriately a matter left between petitioners' counsel and Judge Owens.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petitions for writs of certiorari, mandamus and prohibition should be denied, and respondents request that the costs of this proceeding be assessed against petitioners.

Dated: November 20, 1992

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF JUDGE HODGES ASSESSING SANCTIONS AGAINST FRANKLIN R. NIX PURSUANT TO FED. R. CIV. P. 11 FILED OCTOBER 30, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CASE NOS. 86-43-1-MAC(WDO)
and
86-44-2-MAC(WDO)

CURTIS CHEEVES, et al.,

Plaintiffs,

-vs-

SOUTHERN CLAYS, INC., et al.,

Defendants.

OPINION AND ORDER

Attorney Franklin R. Nix is counsel of record for the Plaintiffs. During a period of two and a half years he has filed in these cases and in a related criminal case[1] no less than seven separate and successive motions seeking to have Chief Judge Wilbur D. Owens, Jr., disqualified as the presiding judge. All of those motions have been denied.

On another occasion, at a time when no such motion for disqualification was pending, Mr. Nix caused deposition notices and subpoenas *duces tecum* to be served on Chief Judge Owens, as well as the other judges of this district, seeking to orally depose

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1. *United States v. Watkins*, Case No. 89-46 MAC(WDO) Criminal.

them "with respect to factual matters relevant to Chief Judge Owens' disqualification." I was designated at that time pursuant to 28 U.S.C. § 292(b) by the Chief Judge of the Circuit for the purpose of deciding motions to quash those subpoenas; and, by opinion entered June 17, 1992, I ordered that the subpoenas should bc quashed and that dcpositions of the judges could not be taken. *Cheeves v. Southern Clays, Inc.*, ___ F.Supp.___(M.D. Ga. 1992) (1992 WL 165479). That opinion recited the factual circumstances surrounding each of the various motions tor recusal, and there is no need, therefore, to repeat that discussion here.

While those proceedings involving the depositions of the judges were pending before me, Mr. Nix filed his seventh and most recent motion for recusal of Chief Judge Owens.[2] By order entered June 5, 1992, Chief Judge Owens denied that motion and, in the concluding paragraph of the order, stated:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

I was then designated for a second time by the Chief Judge ot the Circuit pursuant to 28 U.S.C. § 292(b) to "handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr., to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in

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2. The motion, filed April 9, 1992, was in fact the fifth such motion made in these civil cases. The other two motions, bringing the total to seven, were filed in the related criminal proceeding (see note 1, *supra*.) The motion of April 9, 1992 purported to be addressed to me but I declined to consider it on its merits because I was only designated to decide the deposition issue, not the underlying issue of disqualification. See *Cheeves v. Southern Clays. Inc., supra.*

[these cases]." Mr. Nix filed a timely written response to the order to show cause and I then scheduled and conducted a hearing in the matter on September 16, 1992.

Three issues are presented. The first, raised during oral argument at the hearing, is whether the court has subject matter jurisdiction under Rule 11 to impose any sanctions in the circumstances of this case. The second issue, assuming jurisdiction exists, is whether Rule 11 has been violated; and the third issue involves the appropriate sanction to be imposed in the event a violation of the rule is found. I have determined that subject matter jurisdiction does exist, i.e., that Rule 11 does apply; that the rule has been violated; and that an appropriate sanction in the form of a fine should be imposed.

Mr. Nix points out that the opposing parties have not sought Rule 11 sanctions in the form of attorney's fees or the like; that Chief Judge Owens invoked the rule of his own volition; and that the alleged violation is limited to harassment[3] which, presumably, refers to harassment of the court itself rather than opposing counsel or the opposing litigants since they have made no such claim. From this it is argued that any alleged harassment of the court would necessarily constitute a criminal contempt which can only be dealt with pursuant to Rule 42(b), F. R. Cr. P., or perhaps 18 U.S.C. § 401, and that Rule 11 simply does not apply. Hence, on the present record, Nix argues, the Court is without subject matter

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3. Rule 11, F. R. Civ. P., states in pertinent part:

> The signature of an attorney . . . constitutes a certificate by the signer that the . . . motion, or other paper . . . is not interposed for any improper purpose such as to *harass* or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied).

jurisdiction to impose any sanction against him.

While it is true that there does not appear to be any reported case just like this one in which a court has invoked Rule 11 *sua sponte* to punish counsel for acts of harassment, and while it may also be true that the same behavior would constitute a criminal contempt subject to prosecution. under Criminal Rule 42(b) or 18 U.S.C. § 401, it does not necessarily follow that Rule 11 is thereby rendered inapplicable. There is ample authority for the proposition that Rule 11 can be invoked by the district court on its own motion; the rule, in fact, explicitlv provides that the court may act "upon its own initiative." There is also binding precedent in this Circuit concerning Rule 11 violations that a monetary sanction as a financial penalty, not measured by costs or attorneys' fees of opposing parties, is not only an available option under the rule, it is often the preferred sanction. In *Donaldson v. Clark*, 819 F.2d 1551 1557 (11th Cir. 1987) *en banc*, the Court held:

> Imposing a financial penalty often will be the most effective and fair means of enforcing Rule 11 and deterring baseless suits. When imposed upon a lawyer, a financial penalty forces the lawyer rather than the client to bear the costs of violations of the rule . . . . We hold that monetary sanctions serve the purposes of Rule 11 and may be imposed as sanctions for Rule 11 violations in appropriate cases so long as they are imposed with due process.

The Court also held in *Donaldson* that the contempt rule, Rule 42(b), F. R. Cr. P., need not be followed every time a court considers imposing a monetary sanction, and that a violation of Rule 11 is "fundamentally different from an infraction of criminal

contempt and therefore warrants different sanction proceedings." Id. at 1558. *See also Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209-1210 (11th Cir. 1985) (imposition of fine in disciplinary proceedings distinguished from criminal contempt).

I therefore conclude that Rule 11 can properly be invoked in the circumstances presented by this case, and the fact that the same circumstances might also be made the basis of contempt or disciplinary proceedings does not alter that result.

II

Concerning the central issue of whether counsel's behavior has amounted to harassment in violation of Rule 11, Mr. Nix first argues that the last motion in these civil cases was not even addressed to Chief Judge Owens for decision but was, instead, addressed to me. This alone demonstrates, he says, that harassment of Chief Judge Owens was not intended and could not have been accomplished. This approach, of course, totally ignores the historical background consisting of all of the preceding motions and seeks inappropriately to confine attention to the last motion alone for purposes of the Rule 11 analysis. Clearly, however, in determining whether harassment has occurred it is necessary to examine the totality ot the relevant conduct and the pattern of behavior presented. The word "harassment," almost by definition, will rarely apply to a single act; it usually contemplates a series of acts or taunts. In deciding this issue, therefore, the court will take into account the cumulative effect of, and the circumstances surrounding, all of Mr. Nix's motions to disqualify Chief Judge Owens including those filed in the related criminal proceeding.[4]

4. Of course, Rule 11 has no effect in the criminal case and cannot be applied with respect to any motions filed in that case. It is appropriate, however, to consider the filing of those motions as a part of the overall pattern of conduct from which the Rule 11 issue arises.

Appendix A

With regard to the frequency and repetitive nature of the motions, Mr. Nix argues that each one differed in some important respect from its predecessors so that each motion was, in the language of Rule 11, "well grounded in fact and . . . warranted by existing law." He points out, for example, that the second motion in the civil cases (the third overall motion) was predicated upon "new evidence,"[5] and that the next motion in the civil cases (the fifth overall motion) was based upon both 28 U.S.C. § 144 and § 455(a), accompanied by affidavits, whereas the earlier motions were submitted on the sole authority of § 455(a) without supporting affidavits.

All of the motions, however, and the orders denying them, shared two common features which Mr. Nix simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick. concerning an act of subornation of perjury by Robert L. Watkins, the plaintiffs' agent, so that Chief Judge Owens' impartiality toward Watkins and the plaintiffs might reasonably be questioned.[6] Secondly, the orders denying the motions — including the unpublished opinion of the Court of Appeals in the criminal ease — consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

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5. This "new evidence" is discussed in *Cheeves v. Southern Clays, Inc., supra* ___ F.Supp. at ___.

6. The subornation of perjury by Watkins was the subject of the separate criminal proceeding referred to in note 1, *supra*.

Appendix A

There are two separate statutes governing judicial disqualification. The older statute is 28 U.S.C. § 144 which provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further. . .

The newer statute, enacted in 1974, is 28 U.S.C. § 455 (a) and (b) which provides:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party. . .

The interrelationship of Sections 144 and 455 was first considered in this Circuit[7] in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir.

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7. The law of the Fifth Circuit as it existed prior to October 1, 1981, is the law of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) *en banc*.

1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Court held:

> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. *The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context.* This means that we give §§144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned. (Emphasis supplied).

See also, Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Meester*, 762 F.2d 867 (11th Cir. 1985), *cert. denied*, 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *Jaffree v. Wallace*, 837 F.2d 1461 (11th Cir. 1988).

Mr. Nix argues that Section 455(a), requiring disqualification

whenever a judge's "impartiality might reasonably be questioned," creates a broader basis for recusal than Sections 144 or 455(b)(1) which are restricted to cases of "personal bias," and that under Section 455(a) a disqualification may be required in some cases even when the alleged bias stems from a judicial as distinguished from a personal source. Ordinarily, however, as all of the governing Eleventh Circuit decisions make clear, claims of bias or prejudice under either statute must relate to personal rather than judicial bias; and this remains true under subsection (a) as well as subsection (b) of Section 455. When it is asserted that a judge's "impartiality might reasonably be questioned," it must be shown that the cause stems from extrajudicial conduct; it is only the exceptional case in which bias from a judicial source may require disqualification:

> An exception to the general rule that the bias must stem from an extra-judicial source exists where 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.' (Citation omitted). *United States v. Meester*, 762 F.2d 867. 885 (11th Cir 1985).

In this case none of the motions for disqualification ever claimed a "pervasive" bias and prejudice shown by judicial conduct. Rather, as previously stated, the claim was that Chief Judge Owens' impartiality might reasonably be questioned because of so-called *ex parte* discussions, and one communication by letter, between Chief Judge Owens and Judge Fitzpatrick in a judicial context; and that claim was repeatedly and correctly rejected as legally insufficient.

Moreover, it is important to note that the repetitive motions for disqualification were not just rejected by Chief Judge Owens

alone. The latter two motions in these civil cases — one filed September 26, 1991 and one filed April 9, 1992 — were both submitted *after* the Court of Appeals had *twice* reviewed the denials of earlier motions, once by rejection of a petition for mandamus and prohibition, *In re Theodore Gibson*, No. 90-8561 (11th Cir., June 25, 1990), *reh'g and suggestion of reh'g en banc denied* (Sept. 18, 1990), and once again on the direct appeal in the criminal case. *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), *cert. denied* __ U.S. ___, 112 S.Ct. 333 (1991). *See also,Cheeves v. Southern Clays, Inc., supra,* ____ F. Supp. at ____, n. 10.

In determining the propriety of counsel's conduct under Rule 11, a preliminary question arises as to whether the rule requires a finding of an actual subjective intent to harass, or whether an objective test should be applied, i.e., determining what a reasonable person would have done, or refrained from doing, under the same circumstances. The answer is clear. Under the rule as amended in 1983, the objective standard applies. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) *en banc.*

After reviewing the totality of the circumstances, particularly the filing of seven successive repetitive motions; an apparent failure on the part of counsel to either acknowledge or accept the legal principle consistently applied by the Court in denying those motions, two of such rulings being made by the Court of Appeals itself; and after applying an objective standard to those circumstances (rather than a subjective or bad faith standard), I have concluded that Rule 11 was violated in this case. No reasonable person — no reasonable lawyer — would have filed the last two motions after the Court of Appeals decisions. Or, stated another way, in the language of Rule 11, from any objective point of view those motions could only have been "interposed for [an] improper purpose, such as to harass."

Appendix A

III

Having decided that Rule 11 applies. and that the rule has been violated it remains for the court to determine an appropriate sanction. Since no other party has sought an award of fees or costs (and there is no evidence before me to establish the measure or amount of any such award), the imposition of a fine is the appropriate sanction. *Donaldson v. Clark, supra.* In deciding upon the amount of the fine the court has first attempted to survey the Rule 11 sanctions previously imposed in this district and has discovered, interestingly, that *Donaldson v. Clark* happened to arise here and is the only reported decision involving a Rule 11 sanction in the Middle District of Georgia. In that case a fine of $500 was imposed in addition to fees and costs. In general, it has been held that fines should be established in the least amount necessary to deter future misconduct, and the offender's ability to pay is ordinarily one of the factors to be taken into account in making that judgment. See *White v. General Motors Corporation Inc.*, 908 F.2d 675, 684-685 (10th Cir. 1990) and authorities there cited. In this instance, although notice was given and a hearing was conducted, no evidence was sought or presented concerning Mr. Nix's individual financial status.

I have determined, therefore, that the publication of this opinion together with the assessment of a symbolic fine in the amount of $500.00 and a reference of the matter to the State Bar of Georgia[8] should be sufficient to meet all of the objectives of Rule 11.

Accordingly, attorney Franklin R. Nix is ordered to pay a fine in the amount of $500.00 to the Clerk of this Court. Such fine shall

---

8. The Middle District of Georgia does not presently have a rule of court governing the discipline of members of its bar.

be paid within twenty (20) days, failing which the Clerk shall enter judgment against him in that amount in favor of the United States. The Clerk is further directed to promptly bring this opinion and order to the attention of the State Bar of Georgia for its consideration as to whether additional disciplinary proceedings may be warranted.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of October, 1992.

s/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

APPENDIX B — OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN *UNITED STATES V. WATKINS*, NO. 90-8317 (11TH CIR. DEC. 7, 1990)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8317

D.C. Docket No. CR-89-46-MAC(WDO)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LEE WATKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(December 7, 1990)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

Robert Lee Watkins appeals his conviction of aiding and abetting a witness to testify falsely in violation of 18 U.S.C.

---

* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

§§ 1623 and 2. Appellant claims on appeal that the testimony at issue, although admittedly perjured, was not material. This claim is frivolous.

Appellant also argues that the district judge erred in declining to recuse himself and in declining to refer the recusal decision to another judge pursuant to 28 U.S.C. § 144. After a careful review of the record, we conclude that the district judge did not abuse his discretion.

The letter dated July 11, 1989 conveyed certain information relating to the previous judge's decision to recuse himself. The district judge in this case received that information in his judicial capacity, *i.e.*, as the chief judge of the district with responsibility for reassigning the case. Thus, the district judge acquired that knowledge in his judicial capacity and not in an extra-judicial capacity. Moreover, there is nothing in the letter which indicates bias on the part of the district judge; the letter indicates bias only on the part of the previous judge on account of which he recused himself.

Appellant also asserts that the district judge in this case was biased as a result of conferring with the previous judge. Taking all reasonable inferences favorable to appellant, the context of the alleged conference is as follows: The previous judge, while presiding in a civil case, conferred with his chief judge concerning the appropriate procedure when he suspected that appellant had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case. Thus, any information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge,

in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of the judge.

The other assertions of bias on the part of the district judge are wholly without merit and warrant no discussion.

AFFIRMED.

APPENDIX C — EXCERPTS OF JOINT PETITION FOR WRITS OF MANDAMUS AND PROHIBITION STYLED *IN RE ROBERT WATKINS, THEODORE GIBSON, CURTIS CHEEVES, ET AL.* FILED IN THE ELEVENTH CIRCUIT COURT OF APPEALS JUNE 12, 1992

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. [92-8554]

IN RE ROBERT WATKINS, THEODORE GIBSON, CURTIS CHEEVES, et al.,

Petitioners.

Petition from the United States District Court
for the Middle District of Georgia
Macon Division

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1651 and FRAP 21(a) this Petition seeks writs of mandamus and prohibition disqualifying The Honorable Wilbur D. Owens, Jr., The Honorable Duross Fitzpatrick, and The Honorable Robert Elliott from any further participation in the 28 U.S.C. § 2255 federal habeas proceeding now pending before Judge Owens in *U.S. v. Watkins* and from any further participation in two consolidated civil fraud "kaolin" cases now pending before Judge Owens and styled *Cheeves v. Gibson. et al. v. Southern Clays, Inc., et al.*

A. Misconduct Complaint Under 28 U.S.C. § 372(c).

All of the facts and circumstances relied upon herein were the

subject of a Judicial Misconduct Complaint ("the Complaint") against Judges Owens and Fitzpatrick filed with the Eleventh Circuit Judicial Council pursuant to 28 U.S.C. 372(c) and styled "*In the Matter of a Complaint Filed bv Franklin R. Nix*," Miscellaneous Docket No 90-2132 (the "Complaint"). Franklin R Nix is presently defense counsel in *U.S. v. Watkins* and lead plaintiffs' counsel in *Cheeves & Gibson. All of tho facts and circumstances incorporated by reference herein and under which Petitioners seek the disqualification of Judges Owen, Fitzpatrick and Elliott are identical to the known facts and circumstances presented to the Eleventh Circuit Judicial Council.* The Complaint was dismissed by order of the Eleventh Circuit Judicial Counsel on June 8, 1992

B. Watkins' § 2255 Federal Habeas Petition

The judicial conduct addressed in Watkins' § 2255 proceeding and this Petition spans the 6-year period from January of 1986 to the present date The conduct of Judges Owens, Fitzpatrick, and Elliott, acting individually or in concert, occurred in *U.S. v Watkins* and in four separate civil "kaolin" cases (*Tarbutton, McLendon, Cheeves* and *Gibson*). *U.S. v. Watkins* is apparently a product of Judges Owens' and Fitzpatrick's admitted *ex parte* "oral communications" respecting the investigation, indictment and conviction of Robert Watkins for supposedly "inducing, aiding, and abetting" the false testimony of a civil deposition witness in *Tarbutton.*

The same facts and circumstances investigated under the Complaint are also set forth in a 234-page Brief in Support of Watkins' § 2255 Petition and Motion to Recuse ("Brief in Support"), accompanied by 88 documentary exhibits which Petitioners incorporate by reference herein. (See index at Exhibit

Appendix C

A). Judge Owens' [sic] denied the motion to recuse in Watkins[']
§ 2255 proceeding on June 5, 1992. (Exhibit B).

C. Former Cheeves & Gibson Mandamus Petition.

A former mandamus petition, *In re Thedore Gibson, et al.*, Appeal No. 90-8561, was denied *per curiam* by Circuit Judges Fay, Kravitch, and Clark on June 25, 1990. A petition for rehearing and suggestion of rehearing *en banc* was denied *per curiam* on September 18, 1990. The prior *Cheeves & Gibson* petition, while presenting many of the same facts and circumstances relied upon herein, *did not* present facts and circumstances subsequently discovered. It also *did not* address subsequent developments in Petitioners' proceedings post-dating the denial of the original *Cheeves & Gibson* mandamus petition on June 13, 1990 and the *per curiam* affirmance of Watkins' conviction on December 7, 1990 by Circuit Judges Anderson, Kravitch and Senior District Judge Lynne. The former *Cheeves & Gibson* mandamus also predated the Special Committee's 18-month investigation of the Complaint.

Judge Owens denied the fifth recusal motion filed in *Cheeves & Gibson* on June 5, 1992. (Exhibit C). Describing counsel's filing of the fifth recusal motion in *Cheeves & Gibson* as "harassment," Judge Owens' order of June 5th orders counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions." (Ex. C at 3).

D. Inter-Relationship Between U.S. v. Watkins and Civil Kaolin Cases.

The inter-relationship between *U.S. v. Watkins* and four civil kaolin cases including *Cheeves & Gibson* lies in the fact that

Appendix C

Robert Watkins has acted as the attorney-in-fact pursuant to O.C.G.A. § 10-6-80 on behalf of the civil plaintiffs in *Cheeves & Gibson*. Watkins' same representative capacity in *Tarbutton* and *McLendon* was also the subject of the judicial conduct which occurred in *Tarbutton* and *McLendon*. *U.S. v. Watkins* and all four civil cases were the subject of the Special Committee's Complaint investigation.

E. Exhaustion of Remedies Through Prior Recusal Motions Filed Before Judge Owens.

While the following excerpt from the Special Committee's report states that Petitioners' counsel, in lieu of filing the Complaint, "could file" a § 144 affidavit or "could seek" disqualification under § 455(a), the fact is that *before* filing the Complaint counsel had *already filed* two recusal motions in *U.S. v. Watkins* and three recusal motions in *Cheeves & Gibson* based on §§ 455 *and 144*, all of which were denied.

> Moreover, the Committee is mindful that the 18 (sic) U.S.C. § 372(c) proceeding was not designed to "encompass complaints relating . . . to any matter reviewable under any other provision of law on the record." S. Rep. No. 96-362, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4317. In fact section 372(c) explicitly authorizes dismissal of a complaint "directly relat[ing] to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3). "The complaint procedures of [section 372] provide administrative remedies *only* in the absence of appropriate judicial remedies." *In re Complaint of Judicial*

> *Misconduct*, 858 F.2d 331, 331-32 (6th Cir. 1988)(emphasis added); *see also Charge of Judicial Misconduct*, 691 F.2d at 925.
>
> In the matter at hand, Nix and the parties he represents did not have to resort to the complaint procedure of section 372 if they thought the district judge presiding over the case should be removed for bias or prejudice. Rather, they could file an affidavit, pursuant to 28 U.S.C. § 144 (1988), seeking removal of the judge on the ground that he had "a personal bias or prejudice either against [the filing party] or in favor of any adverse party." *See Matter of Judicial Complaint Under 28 U.S.C. § 372*, 795 F.2d 379, 381 (4th Cir. 1986). Alternatively, they could seek to have the judge disqualified, under 28 U.S.C. § 455(a) (1988), if the judge's "impartiality might reasonably be questioned." A party may seek disqualification of a judge under section 455 (a) during the course of the proceeding, or even after judgment has been entered in the case (as in *Tarbutton*), pursuant to Federal Rule of Civil Procedure 60(b). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862-70, 486 S.Ct. 2194, 2204-07 (1988).

Special Committee Report at 67-68 (emphasis added).

Watkins' *third* recusal motion denied on June 5th (Exhibit B) is contained in the 234-page § 2255 Brief in Support filed herewith. The *fifth Cheeves & Gibson* recusal motion filed April 9th was

denied on June 5th. (Exhibit C). These motions were *both* predicated upon the same facts and circumstances presented in the Complaint and in the Watkins' § 2255 Brief in Support. The filing of this Petition is therefore the only recourse left open to Petitioners.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS.

The eighteen-month duration (9/14/90 to 6/8/92) of the Special Committee's work bears witness to the complexity of the Complaint's subject-matter. Accordingly, instead of attempting a summary of the alleged judicial misconduct, Petitioners incorporate by reference herein the Watkins § 2255 Brief in Support beginning at page 53 and the three-volume set of accompanying documentary exhibits. Because the undisputed course of the Complaint proceedings demonstrate that the judges' impartiality might reasonably be questioned under the facts and circumstances presented in the Complaint, the Court need not review the Brief in Support and exhibits in order to grant the writs sought herein.

III. STATEMENT OF ISSUES PRESENTED

1. Whether a disinterested, objective lay person, fully informed as to the § 372(c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?

2. Whether a disinterested, objective lay person fully informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents *at least* the "appearance of impropriety?"

3. Whether any doubts about the propriety of the judges presiding over Petitioners' proceedings must be resolved in favor of disqualification through issuance of the writs sought by Petitioners?

IV. STATEMENT OF RELIEF SOUGHT

Petitioners seek issuance of a Writ of Mandamus and Prohibition disqualifying the named judges from any further participation in the Watkins' § 2255 proceeding and the *Cheeves & Gibson* cases. Pending resolution of this Petition, Petitioners pray for a stay of Judge Owens' June 5th order (Exhibit C at 3) directing counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions" for the purported "harassment" of the court through counsel's filing of the fifth *Cheeves & Gibson* recusal motion.

V. STATEMENT OF WHY THE WRITS SHOULD ISSUE

A. Effect of § 372(c) Complaint Dismissal.

The Judicial Council's June 8th dismissal of the section 372(c) Complaint against Judges Owens and Fitzpatrick requires several preliminary observations. First, this Petition *does not* represent a collateral attack upon the Judicial Council's June 8th order of dismissal. Such order is subject to review exclusively by an appeal to the United States Judicial Conference pursuant to 28 U.S.C. § 372(c)(10). Rather, this Petition represents the actual exercise of the "appropriate judicial remedies" provided by 28 U.S.C. §§ 144 and 455, both of which figured prominently in the Special Committee's report recommending dismissal, the relevant portions thereof being quoted *supra* at pages 4 - 5. Indeed, Petitioners exhausted *five times* (twice in Watkins and three times

in *Cheeves & Gibson*) the disqualification remedies contemplated under both recusal statutes *before* counsel's filing of the § 372(c) Complaint.

Second, the Judicial Council's order of dismissal represents an *administrative* determination that the judges did not engage in "conduct prejudicial to the effective and expeditious administration of the business of the courts" and *is not* a *judicial* decision barring review herein, under principles of *res judicata* or collateral estoppel, of the entirely different factual issues presented by this Petition under 28 U.S.C. § 144 and 455. Unlike the Complaint just resolved by the Judicial Council, this Petition presents the distinctly different issues of whether a disinterested, objective lay person fully informed of all of the facts alleged in the § 372(c) Complaint (and in the Watkins' Brief in Support) "might reasonably question the impartiality" of the judges.

Finally, regarding the Special Committee's report or the Judicial Council's dismissal of the Complaint as dispositive of this Petition would effectively *nullify* the very alternative "appropriate judicial remedies" which the Special Committee said Petitioners "could file" or "could seek" — remedies which Petitioners in fact exhausted by five recusal motions denied *before* the Complaint's filing. Deeming the Judicial Council's order of dismissal to be dispositive of this Petition would effectively place Petitioners in the Catch 22 situation of *not having* the very alternative remedies which the Special Committee has cited to justify dismissal of the Complaint. (Special Committee Report at 67-68, quoted *supra* at pages 4 - 5[)].

Chief Judge Tjoflat, rather than dismissing the Complaint's objective facts as frivolous, found it necessary to appoint a Special Committee and devote eighteen months of time, unknown

investigative attorneys' fees, and countless hours of the precious judicial time of five Special Committee members to resolution of the Complaint. Without reviewing the accompanying Watkins Brief in Support at all, the Complaint proceedings alone and the actions of the Chief Judge and the Special Committee reflect *at a minimum* their belief that the Complaint's objective facts possibly presented at best the "appearance of impropriety" and at worst actual impropriety prejudicial to the integrity of the judiciary if the "worst implications" of the objective facts were realized[2].

In summary, the quantum of facts necessary to warrant the extraordinarily rare appointment of a Special Committee *substantially exceeds* the quantum of facts under which § 455(a)'s hypothetical, fully-informed "man-in-the-street" might reasonably question the impartiality of the judges. Concluding otherwise requires finding that the Special Committee wasted 18 months worth of time and resources investigating facts that would not even prompt a fully informed objective, disinterested lay person to question the impartiality of the judges. Accordingly, the length, scope, and expense of the Special Committee's investigation has itself become the single most indicative "objective fact" upon which a disinterested lay person, fully informed as to the Complaint proceeding "might reasonably question the impartiality" of the judges investigated notwithstanding the dismissal of the charges.

B. Lack of Adequate Alternative Relief.

Petitioners regret that it has become necessary to seek the extraordinary relief sought herein[3]. As the Second Circuit has

2. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524, n.12 (11th Cir. 1988)

3. Judge Fitzpatrick has already presumably disqualified himself pursuant to (Cont'd)

observed, however, "there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself' . . . A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Business Machines Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980). Likewise, in the seminal case of *Berger v. U.S.*, 255 U.S. 22 (1921), a case which predated the broad mandate of § 455(a), the Supreme Court eloquently explained the inadequacy of appellate remedies other than mandamus.

> To commit to the judge a decision upon the truth of the facts [in the Section 144 affidavit] gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36 (emphasis added).

(Cont'd)

28 U.S.C. § 455(a)(1988) based upon his recusal from *McLendon* upon finding that his "impartiality might reasonably be questioned," and pursuant to 28 U.S.C. § 455(b)(1988) based on his admission that he holds a "personal bias" against Robert L. Watkins..

Appendix C

C. Abuse of Discretion.

When it comes to the question of disqualification, a federal judge's discretion is very narrowly circumscribed by the mandates of Sections 144 and 455 and The Code of Judicial Conduct for United States Judges. This Court has most recently stated the standard for recusal as follows:

> "Congress rewrote section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of section 455, *a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist.* Section 455 does away with the old 'duty to sit' doctrine and *requires judges to resolve any doubts they may have in favor of disqualification.*
>
> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become

> known to the judge. *The standard for recusal under section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.*"

United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)(emphasis added)(citations omitted).

The "objective" test of § 455(a) is best understood in light of the problem which it was intended to address.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg, 486 U.S. 864-65 (footnote omitted)(emphasis added).

The purpose of recusal is to protect the appearance as well as the reality of justice. "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance." *Hall v. Small Business Administration*, 695 F.2d 175, 176 (5th Cir. 1983). Thus the purpose of § 455 is "to promote public confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). The question, then, is not "whether there was actual bias," but whether there was " 'such a likelihood of bias or an appearance of bias that

the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' " *Spruell v. Jarvis*, 654 F.2d 1090, 1095 (5th Cir. 1981). Therefore, the test for determining disqualification is "the reasonable factual basis-reasonable man test" and not the "subjective 'in the opinion of the judge' test." *Davis v. Board of School Commissioners of Mobile Co.*, 517 F.2d 1044, 1052 (5th Cir. 1975). The question to be answered is "whether a reasonable person knowing all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986).

While the alleged bias must be personal as opposed to judicial in nature, *United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985), here the alleged bias is personal. "The objective appearance of bias arises out of a number of accusations made by defendant and his counsel concerning [the judge] and certain members of [his] staff." *United States v. Journet*, 620 F. Supp. 684 (W.D. Pa. 1985). *See also United States v. Meyerson*, 677 F. Supp. 1309 (S.D.N.Y. 1988) (Although prosecutor's allegations were untrue, judge voluntarily recused self because his resentment of prosecutor's tactics prevented him from maintaining impartiality and appearance of impartiality that are necessary to the proper administration of justice.)

Since a reasonable judge would find it necessary to disqualify himself or herself in the face of the allegations made by Mr. Nix in his Complaint and prior recusal motions and by Mr. Watkins in his § 2255 Petition and Brief in Support, the basis for disqualification here rises to constitutional dimensions. This is because the Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990).

Appendix C

In the words of the Eleventh Circuit, the question that must be answered is whether the material facts create a situation that " 'Presents a potential for actual impropriety *if the worst implications are realized.*' " *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 n. 12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied, 109 S. Ct. 2066 (1989). After drawing the worst implications from the material facts presented, the Eleventh Circuit has held that it must "resolve *any* doubts . . . in favor of disqualification." *United States v. Kelly,* 888 F.2d 732, 744 (11th Cir. 1989) (emphasis added).

VI. CONCLUSION

In conclusion, for the reasons stated above, Petitioners request that the relief requested herein be granted.

Respectfully submitted,

s/ L. Ray Patterson
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s/ Franklin R. Nix
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* * *

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

Nos. 92-733 & 92-734

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CHEEVES & THEDORE GIBSON, ET AL.
Petitioners

v.

SOUTHERN CLAYS, INC., ET AL.
Respondents

ON PETITIONS FOR A WRITS OF CERTIORARI,
MANDAMUS AND PROHIBITION
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

REPLY TO BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CHEEVES & THEDORE GIBSON, ET AL.
Petitioners

v.

SOUTHERN CLAYS, INC., ET AL.
Respondents

REPLY TO BRIEF IN OPPOSITION

I. RESPONDENTS' AVOIDANCE OF CONCLUSIVE EVIDENCE

Among the undisputed material facts presented by Petitioners is a "smoking pistol" so hot that Respondents have not dared to address it for fear of conceding Petitioners' entitlement to relief. Pages 4 and 9 of Respondents' Brief in Opposition barely mention the 28 U.S.C. § 372(c) charges filed by Petitioners' counsel. Indeed, Respondents have even deleted § 372(c) references in recasting Petitioners' second question presented. But what the Respondents have **totally avoided** are the following disqualifying admissions made by Judge Owens under oath in testifying on October 10, 1991 before the Special Committee of the Eleventh Circuit Judicial Council. These admissions were made during the pendency of Petitioners' fourth recusal motion filed September 26, 1991, which first asserted Judge Owens' disqualification on the basis of his bias against Petitioners' **counsel**. These admissions remained concealed from Petitioners' and their counsel pursuant to the confidentiality requirements of § 372(c)(14). Not until the judge's testimony was released on June 9, 1992 did Petitioners obtain positive proof of the **falsity** of his claim in his reprisal order of June 5, 1992, that he "harbors no bias or prejudice against Mr. Nix or his clients". (Petition Appendix A-8).

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant other than Mr. Nix, let's say, an attorney other than Mr. Nix, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (emphasis added). These indisputable admissions explain why Respondents' Brief in Opposition con-

tains **no claim** that a fully informed, disinterested lay observer would **not** question the judge's impartiality.

Respondents ask this Court to believe that the Eleventh Circuit was only "presented with the general question of whether the **mere length** of the 28 U.S.C. § 372(c) Judicial Council proceedings involving Judge Owens [and Judge Fitzpatrick and indirectly Judge Elliott] constituted a sufficient appearance of impropriety so as to require recusal of Judge Owens in these cases. The two issues now raised were not addressed below ...". (Brief in Opp. at 9) (emphasis added).

The following Questions Presented to the Eleventh Circuit, as reproduced in Respondents' own appendix, prove that Petitioners argued more than the "mere length" of the § 372(c) proceeding before the Eleventh Circuit.

> 1. Whether a disinterested, objective lay person, fully informed as to the § 372(c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?
>
> 2. Whether a disinterested, objective lay person full informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents *at least* the "appearance of impropriety?"

(Brief in Opp., Appendix C, p. 21a).

Respondents neglected to inform the Court that the judge's above-quoted Special Committee admissions were in fact quoted in full and argued to the Eleventh Circuit in Petitioners' "Factual Supplement" to their mandamus petition. (Appendix A-13-15 hereto).

Let the Court judge for itself whether the judge's sworn admissions satisfy the district court's own below-quoted "rare circumstances" standard for imputing a court's bias against counsel to counsel's clients.

> Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). **In rare circumstances[1], however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.**

(Order of June 5, 1992, Petition Appendix A-8)(emphasis added).

Each of the following admissions prove disqualifying bias against Petitioners' counsel.

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever.

Conference and hearing transcripts in Petitioners' cases do not lie. They disclose that in almost seven years of litigation Petitioners' counsel has appeared before Judge Owens only four times. (8/26/88; 6/30/89; 9/27/89; 5/16/90). Transcripts of these conferences and hearings total only 234 pages

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[1] Such "rare circumstances", however, are arguably unnecessary inasmuch as the judge cited and claimed adherence to Canon 3E(1)(a) of the ABA 1990 Model Code of Judicial Conduct requiring disqualification whenever "the judge has a personal bias or prejudice concerning a party or a party's lawyer." (Petition Appendix A-7) (emphasis added).

and evidence only **15 questions** posed by Petitioners' counsel **in seven years**, most of them being procedural. As to whether counsel "talks forever", line-by-line analysis of the transcripts proves that Petitioners' counsel's comments and arguments accounted for only 46% of the transcripts. Judge Owens and other counsel account for the other 54%.

> [JUDGE OWENS]: I frankly just can only deal with [Petitioners' counsel] if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.

Let Petitioners be equally frank. What the judge has admitted, under a fellow district judge's interrogations, is that he cannot handle or try Petitioners' cases as he normally would so long as Mr. Nix represents Petitioners. Judged in the context of his oath of office (28 U.S.C. § 453) the judge's testimony proves his inability to "administer justice without respect to **persons**" and "impartially discharge" his duties so long as Mr. Nix represents Petitioners.

As to the false inferences intended by comparing Petitioners' counsel to federal habeas petitioners under 28 U.S.C. 2255, the Court should know that the judges of Georgia's Middle District have earned the unique distinction of being the **ONLY** judges whom Petitioners' counsel has **EVER** sought to disqualify or charge with judicial misconduct in nineteen years of extensive state and federal trial practice. Petitioners' counsel has always held Martindale-Hubbell's highest "AV" rating for professional competence and ethical integrity. The Court should also know that the judge's retaliatory "show cause" order of June 5th (Petition Appendix A-6-9) represents the **first** professional misconduct charge **ever** lodged against Petitioners' counsel **by anyone**. These attempts to denigrate his accuser before the Judicial Council are but further proof of the judge's irresistible impulse to retaliate against Petitioners' counsel.

> [JUDGE OWENS]: I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.

What about the judge's admitted attitude toward Petitioners' counsel? He gives no assurance that he is not going to let his **own** attitude toward Mr. Nix affect the cause of Petitioners. As for his insistence that he has to "still preside over these matters", § 455(a) relieves him of any such burden. Can it be that the judge's only concern about relinquishing Petitioners' cases to another judge is the loss of his chance to "even the score" with Petitioners' counsel? Fortunately the objective standard of § 455 spares us the need to divine the true motivation underlying the judge's seeming attempt to retain Petitioners' cases at all costs.

II. RESPONDENTS' MISSTATEMENTS OF FACT

The conclusive effect of the above-quoted disqualifying admissions renders irrelevant most of the misstatements of fact in Respondents' Brief in Opposition. Sadly, it appears that Respondents have shaded or sacrificed the truth to preserve their obvious advantage in retaining Judge Owens in Petitioners' cases. For example, the first three recusal motions filed in Petitioners' cases and all three recusal motions in *U.S. v. Watkins* were all Watkins-based. Only Petitioners' last two recusal motions, both of which were filed and decided **before** Petitioners gained access to Judge Owens' October 10, 1991 Judicial Council testimony, asserted bias and prejudice against Petitioners' **counsel** as a basis for the judges' recusal. (*See e.g.* Petitioners' 9/26/91 Recusal Motion; herein Appendix A-1-11 at 2-3). Respondents' efforts to obscure these distinctions (Brief in Opp. 2), as well as Judge Hodges' failure to distinguish between Watkins-based and counsel-based recusal motions (Brief in Opp. 7) are presently irrelevant. They cannot change the judge's disqualifying admissions of bias against counsel one whit.

Respondents falsely assert that "Mr. Watkins filed judicial misconduct charges against Judge Owens." (Brief in Opp. 4) Mr. Watkins never filed any § 372(c) charges nor was he ever even called as a witness. Such a blatant misstatement, while it should concern the Court, has no effect upon the judge's admitted bias against Petitioners' counsel.

Finally, Respondents' attempt to rehabilitate the judges' impartiality by reliance upon Judge Hodges' own mischaracterization of the record in assessing $500 in Rule 11 sanctions against Petitioners' counsel.[2] (Brief in Opp. 7-8). Respondents failed to advise the Court that Judge Hodges' sanctions order is presently the subject of Petitioners' Rule 59 Motion to Alter or Amend served upon Respondents before they filed their Brief in Opposition.

Thwarting the judge's attempted reprisal against Petitioners' counsel under the guise of Rule 11 sanctions is yet another factor favoring immediate issuance of the summary disposition sought by Petitioners. Given the fact that Judge Owens is a member of the Eleventh Circuit Judicial Council, which includes all active judges of the Eleventh Circuit, Petitioners apprehend that Judge Owens has already lost no time in "poisoning the well" among his Eleventh Circuit brethren. If such has occurred it would perhaps explain why the Eleventh Circuit has turned its back upon the same incontrovertible evidence of disqualification now before this Court.

III. RESPONDENTS' LEGAL ARGUMENTS

All of Respondents' technical legal arguments succumb as well to the conclusive effect of the judge's sworn admissions

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[2] Judge Hodges' attempt to sanction Petitioners' counsel for purported "harassment" of the judge through filing Petitioners' last recusal motion cannot stand in the face of the judge's admissions of bias and prejudice against counsel. Such admissions were not available to Petitioners until June 9th. They prove that Petitioners last recusal motion filed April 9th was well founded and that its denial by the judge on June 5th was clear error. (Petition Appendix A-6-9).

under the disqualification authorities cited in pages 22-30 of Petitioners' Petitions -- authorities strenuously avoided by Respondents.

First, the ultimate issue before this Court of whether the judges' "impartiality might reasonably be questioned" by the man-in-the-street is identical to that presented to the Eleventh Circuit. The fact that Petitioners have cast their Questions Presented in terms of the various factual indicia of disqualification does not alter the question of whether the extraordinary circumstances presented dictate that the judges' "impartiality might reasonably be questioned".[3]

As to Respondents' second argument that the Petitions do not meet the criteria for certiorari, mandamus or prohibition (Brief in Opp. 10) where is Respondents' factual and legal rebuttal to the prima facie elements proven and argued at pages 22-30 of the Petitions? Neither have the Respondents attempted at all to demonstrate, on the basis the undisputed material facts and controlling authorities, why the Court cannot exercise its powers of supervision under Rule 10.1(a), summarily grant Petitioners' Petitions under Rule 16.1, and order permanent reassignment of Petitioners' cases on remand pursuant to 28 U.S.C. § 2106. That all such relief may granted independent of a chief circuit judges's § 292(b) reassignment powers moots Respondents' third argument. (Brief in Opp. 10).

Finally, Respondents' fourth argument (Brief in Opp. 12-13) denying any reprisal by Judge Owens is also adversely controlled by the judge's sworn admissions proving his bias

[3] As emphasized at page 24 of Petitioners' Petitions, the only evidence now before the Court which was not before the Eleventh Circuit was Chief Judge Tjoflat's second reassignment order of July 27, 1992 (Petition Appendix A-4), issued a month after the Eleventh Circuit's June 26th denial of Petitioners' mandamus petition. Once again the Eleventh Circuit's lack of such evidence could not change the conclusive effect of Judge Owens' sworn admissions of bias against counsel -- admissions which were most assuredly argued to and ignored by the Eleventh Circuit. (Appendix 13-15 hereto).

against Petitioners' counsel. Contrary to Respondents' attempt to raise the spectre of abuse, Petitioners do not challenge nor disagree with Respondents' authorities holding that accusations made against judges, whether under § 372(c) or otherwise, do not per se become automatic grounds for disqualification. But none of Respondents' authorities support the proposition that a judge's sworn admissions in a § 372(c) investigation, once publicly disclosed, are somehow "off limits" for purposes of proving that the judge's "impartiality might reasonably be questioned" under 28 U.S.C. § 455.

IV. RELIEF CONSIDERATIONS

It is critical that the Court not forget that Petitioners are seeking **pre-trial** disqualification of Judges Owens, Fitzpatrick and Elliott. Petitioners' situation is therefore distinctly different from those instances in which the Court has qranted plenary review and intervened **post-trial** to protect not the parties bur rather their **counsel** from bias and prejudice in contempt proceedings where the underlying interests of the litigants are no longer in jeopardy or at issue.[4] Neither are Petitioners in the position of needing relief post-judgment on the basis of hitherto unknown disqualifying circumstances as in *Lileberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

These prior instances of intervention by the Court in protecting the integrity and impartiality of the judiciary as well as the due process rights of litigants to trials before impartial tribunals provide strong precedent for granting Petitioners' relief. Are Petitioners' rights to the reassignment of impartial judges in their **trials on the merits** **less** worthy of protection than **counsel's** rights to the reassignment of impartial judges in their post-trial contempt proceedings? Is not a pretrial ounce of prevention for Petitioners to be favored over the post-judgment pound of cure dramatically illustrated in *Liljeberg*?

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[4] *E.g., Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *Cooke v. United States*, 267 U.S. 517 (1925); *Spruell v. Jarvis*, 654 F.2d 1090 (5th Cir. Unit B 1981).

Denying Petitioners at least the reassignment readily available and liberally used under § 2106[5] in exercise of the Court's powers of supervision in the extraordinary circumstances of these cases would most certainly condemn Petitioners to the inadequacy of post-judgment appeals recognized in *Berger v. United States*, 255 U.S. 22, 36 (1921).

> The [disqualification] remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

V. CONCLUSION

Shall the Court stay exercise of its supervisory power in the speculative hope that the Petitioners' pre-trial recusal efforts might at least have the prophylactic effect of assuring that Judge Owens bends over backwards to give Petitioners fair trials on the merits? Petitioners do not ask to be advantaged, as Respondents presently are; they ask only for a level playing field. Absent this Court's remand with directions for reassignment, what relief can this Court entrust to the Eleventh Circuit when it has alredy refused to act even on the basis of a district judges' **sworn admissions of bias against counsel**? Accordingly, upon the undisputed material facts before the Court and the controlling authority of 28 U.S.C. § 455, Petitioners respectfully pray that the Court exercise its powers of supervision, grant the appropriate writ and effect a summary disposition on the merits ordering the permanent reassignment of Petitioners' causes to impartial district judges.

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[5] *E.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992); *United States v. Torkington*, 874 F. 2d 1441 (11th Cir. 1989); *United States v. White*, 846 F.2d 678 (11th Cir. 1988); *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982); *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977) (en banc).

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Petitioners' Counsel of Record

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 8:30 A.M.

SEPT 26, 1991

/s/ Elaine W. Jones
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

LULA SMITH COURTNEY, as Administratrix of the Estate of Sidney J. Smith, Jr.,	)	
Petitioner,	)	CIVIL ACTION NO. 88-324-3-MAC (WDO)
v.	)	
Defendant.	)	

CURTIS CHEEVES, et al., THEODORE GIBSON, et al.,	)	
Plaintiffs,	)	CONSOLIDATED CIVIL ACTION FILE NO. 86-43-1-MAC (WDO)
v.	)	
SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST, by and through its Trustees,	)	
Defendants.	)	

MOTION TO RECUSE AND BRIEF IN SUPPORT

TO: The Honorable Wilbur D. Owens, Jr.
The Honorable Duross Fitzpatrick

COMES NOW the undersigned counsel of record in the above-styled cases, pursuant to 28. U.S.C. §455(a) and Judicial Canon 3C(1), and respectfully moves United States District

Judges Wilbur D. Owens, Jr. and Duross Fitzpatrick to recuse themselves from all further proceedings in the above styled causes upon the grounds that their "impartiality might reasonably be questioned" therein within the meaning of 28 U.S.C. §455(a) and Canon 3C(1) of the Code of Judicial Conduct for United States Judges (69 F.R.D. 273).

This recusal motion is addressed to Judge Fitzpatrick only to the extent that any of the above-styled causes are transferred to Judge Fitzpatrick after any recusal by Judge Owens. Judge Fitzpatrick previously recused himself in the Courtney v. Georgia Kaolin Company case according to correspondence of the Clerk of Court dated September 18, 1989. By correspondence dated July 11, 1989, to the undersigned counsel Judge Fitzpatrick also recused himself from deciding a motion to compel against Anglo-American Clays Corporation in the Cheeves and Gibson cases. The same bases upon which Judge Fitzpatrick previously recused himself in the above-styled cases still apply with equal force to any reassignment of the above-styled cases to Judge Fitzpatrick.

I. INTRODUCTION

This recusal motion is predicated upon entirely different grounds and objective facts completely unrelated to the prior recusal motions in Cheeves and Gibson which Judge Owens previously denied under his Orders of January 17, January 30, and May 23, 1990. This recusal motion has nothing to do with the status of Robert L. Watkins in these cases or the ex parte communications between Judge Owens and Fitzpatrick about Watkins which were the subject of the last Cheeves and Gibson recusal motion. Likewise, the grounds now relied upon are totally different from those previously relied upon in filing the Cheeves and Gibson Mandamus Petition in the United States Court of Appeals for the Eleventh Circuit.

Instead, this recusal motion is predicated exclusively upon the grounds that any objective, disinterested lay observer fully informed about the course of events between the plaintiffs, plaintiffs' counsel, and Judges Owens and Fitzpatrick

since July 20, 1990, might reasonably question the impartiality and the propriety of Judges Owens or Fitzpatrick continuing to preside in these proceedings.

II. OBJECTIVE MATERIAL FACTS

1. On July 20, 1990, plaintiffs' counsel filed Judicial Misconduct Complaint No. 90-2132 ("the Complaint") pursuant to 28 U.S.C. §372(c) against Judges Owens and Fitzpatrick with the Judicial Council of the United States Court of Appeals for the Eleventh Judicial Circuit, charging such judges, inter alia, with concerted and wilful violations of the disqualification and recusal mandates of 28 U.S.C. §§ 144 and 455, and Canons 3A(4) and 3C(1) of the Code of Judicial Conduct for United States Judges. The contents of the Complaint are well known to both judges.

2. Eleventh Circuit Chief Judge Tjoflat, after finding probable cause pursuant to 28 U.S.C. § 372(c)(4) and Judicial Council Rule 4, caused the Complaint to be formally docketed on August 17, 1990 and subsequently issued his notice dated September 14, 1990.

3. On January 21 and 22, 1991, plaintiffs' counsel met with private investigative counsel, explained in great detail the judicial misconduct committed by Judges Owens and Fitzpatrick, identified numerous witnesses who could give testimony in support of the Complaint, and answered all questions asked by investigative counsel.

4. By correspondence dated January 24, 1991, plaintiffs' counsel reported all of the misconduct of Judges Owens and Fitzpatrick to the Public Integrity Section of the Criminal Division of the United States Department of Justice. Plaintiffs' counsel charged Judge Fitzpatrick with violation of 18 U.S.C. § 201 (bribery) and Judge Owens and Judge Fitzpatrick, acting individually, and in concert, with obstruction of justice under the omnibus clause of 18 U.S.C. § 1503. Since January 24, 1991, plaintiffs' counsel has cooperated with the Public Integrity Section and the Federal Bureau of Investigation in providing

additional information and documents relevant to the subject criminal investigation.

5. Since first meeting with private investigative counsel plaintiffs' counsel has continued to provide such counsel with supplemental information and documents in support of the Complaint.

6. Only July 3, 1991, plaintiffs' counsel reported certain aspects of the misconduct of Judges Owens and Fitzpatrick to the Supreme Court of the United States by way of posing, inter alia, the following "question presented" in the Certiorari Petition filed July 3, 1991, in Watkins v. United States, No. 91-184:

> Can two federal district judges, one acting as accuser and the other acting as the accuser's advisor and Petitioner's trial judge, engage in the following concerted conduct -- i.e., (a) engage in secret, ex parte "in-chambers conferences" and "oral communications", with the object of procuring Petitioner's investigation, indictment, prosecution and conviction; (b) thereafter conceal such communication in denying Petitioner's pretrial recusal motion under Section 455(a) based on other evidence; (c) subsequently misrepresent and lie to defense counsel in claiming no ex parte acquired knowledge about Petitioner; (d) subsequently deny Petitioners' post-trial recusal motion under 28 U.S.C. §§ 455(a) and 144, while admitting for the first time the judges' ex parte communications about Petitioner but excusing such contacts as "not extrajudicial" and (e) thereafter absolutely refuse to disclose voluntarily all material facts and thwart all efforts of defense counsel to discover the full extent and subject matter of all information exchanged between the judges -- without having violated the Fifth Amendment to the Constitution of the United States, 28 U.S.C. §§ 144 and 455, Judicial Canons

1,2,3A(4) and 3C(1), the omnibus clause of 18 U.S.C. § 1503 (obstruction of justice) and, at a minimum, committed acts prejudicial to "the effective and expeditious administration of justice" within the meaning of 28 U.S.C. § 372(c) (1)?

7. On September 16, 1991, plaintiffs' counsel was served with a subpoena to appear at hearings scheduled upon the Judicial Misconduct Complaint. Plaintiffs' counsel has since been invited to submit the names of witnesses who can be called to testify in support of the Complaint's allegations.

8. Plaintiffs' counsel not only intends to appear to testify against Judges Owens and Fitzpatrick at the scheduled hearings but also intends to identify other witnesses to the judges' misconduct and otherwise exercise all of plaintiffs' counsel's rights as a complainant under Judicial Council Rule 13. Plaintiffs' counsel further intends to present additional written information and argument to the Special Committee respecting the judges' judicial misconduct and after issuance of the Eleventh Circuit Judicial Council's decision, to exercise fully complainant's right of appeal to the Judicial Conference of the United States, if necessary.

III. ARGUMENTS AND AUTHORITIES

A. GOVERNING AUTHORITIES.

This recusal motion is controlled by the mandates of 28 U.S.C. § 455(a) and Judicial Canon 3C(1) of the Code of Judicial Conduct for the United States Judges.

§ 455. Disqualification of Justice, Judge or Magistrate

(a) Any justice, judge or magistrate, of the United States **shall** disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (emphasis added).

Canon 3C(1)

C. Disqualification

(1) A judge **shall** disqualify himself in a proceeding in which his impartiality might reasonably be questioned ..." (emphasis added)

B. ISSUES NOT PRESENTED

Plaintiffs' reliance upon the above-quoted recusal standards requires no proof of any personal bias or prejudice by the subject judges nor is it based upon a recusal mandate which is peculiar to the plaintiffs alone. The issue therefore is not whether the judges hold any personal bias or prejudice against the plaintiffs or against plaintiffs' counsel as a result of the course of events initiated by plaintiffs' counsel against both judges. Instead the only issue presented is whether a disinterested, objective, lay observer, fully advised of all the above-stated indisputable actions of plaintiffs and plaintiffs' counsel, "might" entertain a reasonable doubt about the judges' ability to conduct the above-style proceedings with impartiality.

In denying prior recusal motions based upon entirely different grounds, Judge Owens has consistently avoided the above-quoted standards with irrelevant subjective disclaimers of any personal bias or prejudice toward the Cheeves and Gibson parties and their personal representative. Such disclaimers are relevant only to recusal motions predicated upon 28 U.S.C. § 455(b) and Canon 3(c) (1) (a), neither of which are the basis of this recusal motion.

C. PROCEDURAL ISSUES

Neither does there exist any procedural basis for Judge Owens' avoidance of this recusal motion. Contrary to prior holdings by Judge Owens in the Cheeves and Gibson cases, no affidavit is required for recusal motions brought exclusively under 28 U.S.C. § 455(a) and Canon 3C(1). Neither is a certifi-

cate of good faith by counsel, as required under 28 U.S.C. § 144, required to accompany this recusal motion. Unlike the one-motion limit imposed by 28 U.S.C. § 144 there is no limit to the number of recusal motions which may be filed under 28 U.S.C. § 455(a) and Canon 3C(1).

Judge Owens also cannot claim that he has already resolved or decided this recusal motion in prior decisions or orders of the Court inasmuch as the objective facts upon which it is based constitute entirely new grounds which have arisen since the Court's denial of the last recusal motion in Cheeves and Gibson with its Order of May 23, 1990. Indeed, these new grounds are continuing to develop and arise as the proceedings which plaintiffs and plaintiffs' counsel have initiated against both judges continue to evolve.

D. ISSUE PRESENTED

The one issue -- i.e., whether both judges' "impartiality might reasonably be questioned" -- under the above-quoted recusal standards and the standard under which the issue is to be answered have been clearly explained by the United States Court of Appeals for the Eleventh Judicial Circuit in United States v. Kelly, 888 F.2d 732 (11th Cir. 1989).

> Congress rewrote Section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of Section 455, a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist. Section 455 does away with the old 'duty to sit' doctrine and requires judges to resolve any doubts they may have in favor of disqualification.

> "The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge. The standard for recusal under Section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."

Id. at 744 (emphasis added).

The "objective" test of Section 455(a) and Canon 3C(1) was specifically instituted to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg v. Health Services Acquisition, Corp., 486 U.S. 847, 864-65, 108 S. Ct. 2194, 2205 (1988) (footnote omitted). Thus, it is beyond cavil that it is the opinion of the lay observer respecting the objective facts stated above and not the Court's own

subjective opinions of its impartiality that govern whether disqualification of both judges is mandated by Section 455(a) and Canon 3C(1).

E. RESOLUTION OF DOUBTS

Finally, it is clear that any suspicions or doubts which a lay observer might readily derive from the material, undisputed facts stated above respecting the actions of plaintiffs and plaintiffs' counsel towards both judges must be resolved in favor of finding a potential impropriety or appearance of impropriety. In the words of the Eleventh Circuit, the question which Judge Owens must face and answer is whether the above-stated objective material facts "'present a potential for actual impropriety if the worst implications are realized.'" Parker v. Connors Steel Co., 855 F.2d 1510, 1524, n.12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied. 109 S.Ct. 2066 (1989). After drawing the worst implications from the above-stated objective facts in terms of the likelihood that "the judges impartiality might reasonably be questioned", the Eleventh Circuit has further directed this Court to "resolve any doubts ... in favor of disqualification." Kelly, supra, 888 F.2d at 744 (emphasis added).

F. STATUTORY ANALYSIS

Reviewing the statutory analysis utilized by the Supreme Court in Liljeberg, as well as the express language of Section 455(a) and Canon 3C(1) underscores the necessity of recusal by both judges in the above-styled causes. Paraphrasing the Supreme Court's inquiry in Liljeberg, "might" Judge Owens' continued presiding over the above-style causes present a sufficient "appearance of impropriety" so as to require both judges to recuse themselves in order to avoid the "suspicions and doubts" which a disinterested lay observer would undoubtedly entertain? Or, in the words of the statute, "might" any reasonable layman question both judges' impartiality, in which event both judges "shall" disqualify themselves?

The statutory language of Section 455(a) and Canon 3C(1) asks not whether a reasonable "would" question the

judges' impartiality toward the plaintiffs' or their counsel. To the contrary, the much broader question presented is whether their exists the mere possibility under the objective facts that judges' impartiality "might" reasonably be questioned. Unless it can be said beyond "any doubt" that no reasonable person might question the judges' impartiality, recusal is mandatory not only under Liljeberg but also under the "any doubts" mandate of Kelly.

IV. CONCLUSION

Any continued insistence by Judge Owens to preside over the above-style cases in spite of the above-stated objective facts and applicable law would be extraordinary indeed. Liljeberg makes clear that Section 455(a) eliminated any vestiges whatsoever of the old "duty to sit" doctrine. Moreover, neither of the judges have any propriety interest in presiding over the above-styled cases. As the Supreme Court of the United States observed long ago, a judge's disqualification "presents no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; or what concern to other parties to have him so preside?" Berger v. United States, 255 U.S. 22, 35 (1921).

Plaintiff's counsel was compelled by Directory Rule 1-103(B) of the Code of Professional Responsibility to file the Complaint now pending against both judges. Counsel has the further professional responsibility to his clients in the above-styled causes to insure, through the enforcement of Section 455(a) and Canon 3C(1), that the plaintiffs' Fifth Amendment right to trial of their cases before a fair and impartial tribunal is preserved. In so doing, plaintiffs' counsel has absolutely no control over choice of judge before whom the plaintiffs' cases may ultimately be heard. Of all of the risks normally attendant to litigation, no party should have to be subjected to the risk that his cause may suffer through the conscious or unconscious reprisal of the Court against actions taken by plaintiffs' counsel in discharge of his professional responsibilities and protection of his clients' rights.

Judge Owens may genuinely and sincerely believe that despite the actions of plaintiffs' counsel he can put aside any resentment or ill feelings engendered by counsel's actions and preside over the above-styled suits justly. But that is not the test imposed by Section 455(a) and Canon 3C(1). The test is whether an objective disinterested layman "might" doubt or suspect that Judge Owens, being human could not lay aside any such resentment or ill feelings. Moreover, apart from Judge Owens' conscious feelings, impartiality is more likely to be affected by unconscious thought processes with the result that Judge Owens may have little or no conscious knowledge of being swayed by such improper influences as antipathy towards plaintiffs' counsel. Even if Judge Owens were theoretically able to put aside both his conscious and unconscious feelings and reactions to the actions of plaintiffs' counsel, the taint of impropriety would continue to surround any ultimate result in these cases, and in turn, cast disrepute upon the judiciary. In the final analysis, therefore, recusal in any case involves not only adherence to Section 455(a) and Canon 3C(1) but also upholding the judge's obligation under Canon 1 to "uphold the integrity and independence of the judiciary" and under Canon 2 to avoid impropriety and the appearance of impropriety in a "manner that promotes public confidence in the integrity and impartiality of the judiciary."

This 25th day of September, 1991.

/s/ Franklin R. Nix
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
RECEIVED
JUN 17 1992
ATLANTA, GA.

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

Petition from the United States District Court
for the Middle District of Georgia
Macon Division

PETITIONERS' FACTUAL SUPPLEMENT TO
JOINT PETITION FOR WRITS OF MANDAMUS
AND PROHIBITION DISQUALIFYING
THE HONORABLE WILBUR D. OWENS, JR.
THE HONORABLE DUROSS FITZPATRICK
THE HONORABLE ROBERT ELLIOTT

I. ISSUES PRESENTED

Presently pending before the Court are the following three issues presented at page 6 of the above-styled Joint Petition filed June 12, 1992.

1. Whether a disinterested, objective lay person, fully informed as to the § 372 (c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?

2. Whether a disinterested, objective lay person fully informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents **at least** the "**appearance** of impropriety?"

3. Whether any doubts about the propriety of the judges presiding over Petitioners' proceedings must be resolved in favor of disqualification through issuance of the writs sought by Petitioners?

II. ADDITIONAL MATERIAL FACTS

In light of the above-stated issues, the purpose of this factual supplement is to provide the Court with additional material facts consisting of Judge Owens' testimony before the Special Committee, which testimony was not made available to Petitioners' counsel until June 9, 1992, and to acquaint the Court as well with the substance and pendency of the criminal charges lodged by Petitioners' counsel with the Public Integrity Section of the Criminal Division and the Criminal Section of the Civil Rights Division of the United States Department of Justice.

A. Judge Owens' Attitude Toward Petitioners' Counsel.

Notwithstanding Judge Owens' assertion in his order of June 5, 1992 that he "harbors no bias or prejudice against Mr. Nix or his clients" (Petition Exhibit C at 3), Judge Owens' sworn testimony at page 342 of his 25 pages of testimony before the Special Committee suggests otherwise.

> [JUDGE OWENS]: **Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. I frankly just can only deal with him if I say as little as necessary.** And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.

> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant **other than Mr. Nix**, let's say, an attorney **other than Mr. Nix**, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (Exhibit A hereto) (emphasis added).

Although Judge Owens' response to Judge Hobbs' above-quoted question was admittedly "hypothetical" via-a-vis counsel other than Mr. Nix, Judge Owens' actual response to Mr. Nix's prior non-hypothetical inquiries comparable to that posed by Judge Hobbs -- such inquiries being in the form of interrogatories and a presently pending deposition and duces tecum subpoena now the subject of the Government's motion to quash, was an unqualified refusal to provide any information whatsoever. The above-emphasized testimony of

Judge Owens respecting Mr. Nix raises squarely the issue of whether a disinterested, objective lay person fully informed of Judge Owens' stated attitude toward Mr. Nix "might reasonably question Judge Owens' impartiality."

B. Criminal Charges Lodged January 24, 1991.

Attached hereto as Exhibit B is a true copy of Mr. Nix's correspondence of January 24, 1991 formally lodging charges with the Public Integrity Section of the Criminal Division of United States Department of Justice. The correspondence charged Judge Fitzpatrick with possible violations of 18 U.S.C. § 201 (bribery) and Judges Owens and Fitzpatrick acting in concert with conduct obstructing justice in violation of 18 U.S.C. § 1503. After having investigated only the bribery charge against Judge Fitzpatrick, the F.B.I. closed its investigation pursuant to a memo dated November 25, 1991 incorporated at pages 52-54 of the Special Committee's Report.

C. Criminal Charges Lodged May 29, 1992.

Pursuant to correspondence dated May 29, 1992 addressed to the Public Integrity Section of the Criminal Division and the Criminal Section of the Civil Rights Division of the United States Department of Justice (Exhibit C), Mr. Nix charged Judges Owens and Fitzpatrick with criminal obstruction of justice, a charge which had not been previously investigated, and with criminal violations of the Petitioners' civil rights under 18 U.S.C. §§ 241 and 242. The present status of these charges before the Department of Justice is unknown except for correspondence of Linda K. Davis, Chief of the Criminal Section of Civil Rights Division dated June 9, 1992 (Exhibit D) advising that the investigation of all charges would be conducted by the Public Integrity Section and the Office of Professional Responsibility. Upon receiving Ms. Davis' letter on June 11, 1992, Petitioners' counsel advised Thomas Burrows, Esq. of the Public Integrity Section by facsimile dated June 11, 1992 of the issuance and public availability of the Special Committee's Report. What effect the Special Committee's

Report and Judicial Council action thereon may have upon the pending charges and the Justice Department's investigation thereof is unknown.

III. ARGUMENT

Petitioners' counsel do not doubt that Judge Owens subjectively and sincerely believes, despite the actions of Petitioners' counsel and Judge Owens' above-quoted attitude toward Mr. Nix, that he can put aside any resentment or ill feelings engendered by counsel's actions and justly preside over Petitioners' proceedings. But that is not the test imposed by Section 455(a) and Canon 3C(1). The test is whether an objective, disinterested layman "might" doubt or suspect that Judge Owens, being human, could not lay aside any such resentment or ill feelings.

Apart from Judge Owens' conscious feelings, impartiality is more likely to be affected by unconscious thought processes with the result that Judge Owens may have little or no conscious knowledge of being swayed by such improper influences as antipathy towards Petitioners' counsel. Even if Judge Owens were theoretically able to put aside both his conscious and unconscious feelings and reactions to the actions of Petitioner's counsel, the taint of impropriety would continued to surround any ultimate result in these cases, and in turn, cast disrepute upon the judiciary.

And what purpose is served by deferring the resolution of the recusal issues presented herein until after trials or hearings on the merits of Petitioners' causes rather than eliminating by writs of mandamus any disqualification and new trial grounds and later appeals. If the writ sought herein were denied and Petitioners lost their proceedings before Judge Owens, the very same facts already amassed before the Court would dictate on direct appeal a new trial for Petitioners before a different judge as in Liljeberg. Petitioners, however, have no interest in retaining and preserving for later appeal disqualification and new trial grounds already proven by the objective facts before the Court. To the contrary, Petitioners ask only for

a "level playing field"; for but one trial before a judge whose impartiality is beyond question or reproach.

IV. CONCLUSION

In the final analysis recusal in any case involves not only adhering to Section 455(a) and Canon 3C(1) but also upholding the judges' obligations under Canon 1 to "uphold the integrity and independence of the judiciary" and under Canon 2 to avoid "impropriety and the appearance of impropriety" (Canon 2 Commentary) in a "manner that promotes public confidence in the integrity and impartiality of the judiciary." For these reasons and those set forth in Petitioners' original petition, counsel respectfully request issuance of the writs sought hereby.

Respectfully submitted,

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